VOL. 37 (2d Series) SEPTEMBER 15, 1972 No. 1

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(37 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 37 (2d Series)

Pages 1 to 150

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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INDEX

	Page
Advanced Electronics et al.; docket No. 18652 et al. (F.C.C. 72R–210)	1
Advanced Electronics et al.; docket No. 18652 et al. (F.C.C. 72D–45)	12
Aircraft Use of Land Mobile Frequencies; docket No. 19545 (F.C.C. 72–754)	28
Berwick Broadcasting Corp.; docket No. 17884 (F.C.C. 72R–204)	30
Citizens Communications Center; request for permission to inspect financial reports of Metromedia, Inc. (KTTV–TV)	32
Coastal Electronics Co.; docket No. 19384 (F.C.C. 72R–200)	35
Conguista, Tony P.; file No. BR–3735 (F.C.C. 72–763)	36
Dowric Broadcasting Co., Inc., et al.; dockets Nos. 19448, 19449, and 19450 (F.C.C. 72R–212)	40
Erwin O'Conner Broadcasting Co. et al.; dockets Nos. 18547 and 18548 (F.C.C. 72R–219)	45
FM Table of Assignments; docket No. 19330 (F.C.C. 72–775)	47
FM Table of Assignments; docket No. 19331 (F.C.C. 72–774)	50
FM Table of Assignments; docket No. 19413 (F.C.C. 72–772)	54
Harvit Broadcasting Corp. et al.; dockets Nos. 18456 and 18457 (F.C.C. 72R–234)	60
Holt, Charles W., et al.; dockets Nos. 19445, 19446, and 19447 (F.C.C. 72R–199)	64
Korngold, Alvin L., et al.; dockets Nos. 19087 and 19088 (F.C.C. 72R–202)	68
Lakes Area Broadcasting Co.; forfeiture (F.C.C. 72–747)	74
Pacific FM, Inc.; request for declaratory ruling re multiplex transmission (F.C.C. 72–722)	76
Polk, Jr., Laurence N., et al.; docket No. 18784 (F.C.C. 72R–201)	78
Polk, Jr., Laurence N., et al.; docket No. 18784 (F.C.C. 71D–36)	83
Prime Time Access Rule; request for waiver by WRTV for period October 1–28, 1972 (F.C.C. 72–780)	108
Prime Time Access Rule; requests for waiver concerning sports events during the fall of 1972 (F.C.C. 72–782)	110
RKO General, Inc., et al.; dockets Nos. 18759, 18760, and 18761 (F.C.C. 72R–228)	113
Salem Broadcasting Co., Inc., et al.; dockets Nos. 19434, 19435, and 19436 (F.C.C. 72R–208)	115
Service Electric Cable TV, Inc.; docket No. 19321 (F.C.C. 72R–221)	119
Southland, Inc. et al.; dockets Nos. 19415 and 19416 (F.C.C. 72R–229)	125
Video Empresas Del Oeste, Inc.; file No. BPCT–4450 (F.C.C. 72–768)	136
WIOO, Inc., et al.; dockets Nos. 19468, 19469, and 19471 (F.C.C. 72R–231)	140
WPIX, Inc.; et al.; dockets Nos. 18711 and 18712 (F.C.C. 72R–237)	146

F.C.C. 72R-210

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
APPLICATION OF ROBERT L. MOHR, D.B.A. ADVANCED ELECTRONICS FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT PALOS VERDES ESTATES, LOS ANGELES, CALIF.	Docket No. 18652 File No. 2391–M–P–35
APPLICATION OF GENERAL TELEPHONE CO. OF CALIFORNIA FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT MALIBU, CALIF.	Docket No. 18653 File No. 2683–M–P–95
APPLICATION OF THE PACIFIC TELEPHONE & TELEGRAPH CO. FOR A CONSTRUCTION PERMIT TO RELOCATE PUBLIC CLASS III–B COAST STATION KMB–393 FROM SAN PEDRO, CALIF., TO DAKIN PEAK, NEAR AVALON, SANTA CATALINA ISLAND, CALIF.	Docket No. 18654 File No. 2729–M–P–105
APPLICATION OF GENERAL TELEPHONE CO. OF CALIFORNIA FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SANTA BARBARA, CALIF.	Docket No. 18655 File No. 2684–M–P–95
APPLICATION OF COAST MOBILPHONE SERVICE FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SANTA BARBARA, CALIF.	Docket No. 18656 File No. 2602–M–P–75
APPLICATION OF THE TELEPHONE CO., INC. (SILVER BEEHIVE), FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED ON SANTA CRUZ ISLAND, CALIF.	Docket No. 18657 File No. 4879–M–P–48
APPLICATION OF THE TELEPHONE CO., INC. (SILVER BEEHIVE), FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SAN CLEMENTE ISLAND, CALIF.	Docket No. 18658 File No. 4997–M–P–58
APPLICATION OF FRANCIS I. LAMBERT AND HARRY L. BROCK, JR., D.B.A. ADVANCED COMMUNICATIONS CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT BROADCAST PEAK, NEAR SANTA BARBARA, CALIF.	Docket No. 18659 File No. 5163–M–P–78
APPLICATION OF FRANCIS I. LAMBERT AND HARRY L. BROCK, JR., D.B.A. ADVANCED COMMUNICATIONS CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT CUESTA GRADE PEAK, NEAR SAN LUIS OBISPO, CALIF.	Docket No. 18660 File No. 5162–M–P–68

109–00S—72——1

APPLICATION OF R.C.S., INC., FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT TASSAJERA PEAK, NEAR SAN LUIS OBISPO, CALIF.	Docket No. 18661 File No. 5283–M–P–88
APPLICATION OF DANA POINT MARINE TELEPHONE CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SANTIAGO PEAK, NEAR DANA POINT, CALIF.	Docket No. 18662 File No. 5447–M–P–98
APPLICATION OF THE PACIFIC TELEPHONE & TELEGRAPH CO. FOR RENEWAL OF LICENSE OF EXISTING PUBLIC CLASS III–B COAST STATION KMB–393 AT SAN PEDRO, CALIF.	Docket No. 18663 File No. 5615–M–RL–128

APPEARANCES

Philips B. Patton, *Arthur Blooston* and *Jeremiah Courtney*, on behalf of Advanced Electronics, R.C.S., Incorporated, Dana Point Marine Telephone Company, and The Southern California Marine Radio Council; *H. Ralph Snyder, Jr.*, *George A. Shortzer*, *Timothy Fitzpatrick*, *A. M. Hart*, and *Walter Rook*, on behalf of General Telephone Company of California; *Dudley A. Zinke* and *Alfred C. Partoll*, on behalf of The Pacific Telephone and Telegraph Company; *Arthur Blooston*, *Jeremiah Courtney* and *Tom Halde*, on behalf of Coast Mobilphone Service; *Arthur W. Brothers*, on behalf of The Telephone Company, Inc. (Silver Beehive); *William H. Borghesani, Jr.*, *David L. Hill* and *Harry L. Brock, Jr.*, on behalf of Advanced Communications Company; *Rufus G. Thayer* and *Jeremiah Courtney*, on behalf of The California Public Utilities Commission; and *Terrence P. O'Brien*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted August 2, 1972; Released August 8, 1972)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND KESSLER.

1. The parties named in the caption have applied for authority to operate VHF public Class III–B coast stations at one or more points on the Pacific Coast extending from San Diego in the south to San Luis Obispo, California, in the north. The background of the case and other matters are detailed in the Initial Decision (FCC 71D–45), released July 29, 1971, and need not be repeated. The Board is under directions from the Commission to expedite the issuance of a decision.[1] Appendix A contains a list of the exceptions and related pleadings filed by the parties. Oral argument on the exceptions has not been requested, and in the circumstances of this case the public interest does not require that argument be heard.[2] Unless and to the

[1] 34 FCC 2d 657 (1972).
[2] In connection with the Commission's action on the motion to expedite, Silver Beehive requested the Commission to order the Board to hear oral argument. The Commission denied this request.

extent modified herein or in the rulings on exceptions, the Examiner's findings and conclusions are adopted.

2. The Examiner denied all of Silver Beehive's applications for several reasons, chief among them being that the applicant had failed to present reasonable assurance that it could obtain the transmitter sites it proposed to use. Silver Beehive does not seriously challenge this finding, arguing instead that the question of site availability is not relevant because it was not in issue and no evidence was offered indicating the sites would not be available once a grant had been made. Silver Beehive also avers that since the hearing was concluded certain letters establishing availability of the sites have been secured.

3. The Board construes the first and last issues as encompassing a determination of whether the various proposals are reasonably feasible, *i.e.*, whether it is reasonably likely that they will be built and commence operation without delay. The availability of a site from which the proposed operation can be conducted is, in this determination, essential, and in Silver Beehive's case, none of the land on either of the islands where that applicant plans to locate its transmitters has been shown to be available. Indeed, the contrary has been indicated with reasonable certainty by the applicant's own evidence. More recently acquired data, none of which is before the Board or a part of this record, cannot be relied on; the applicant had ample opportunity at the hearing to establish the feasibility of its proposal.[3] Thus, on this ground alone a grant could not be made to Silver Beehive, and no further consideration will be given to its proposals. The other reasons given by the Examiner for denial of Silver Beehive's applications are of lesser importance but are further indicators of the problems lying in the way of establishment of service by that applicant. Silver Beehive's applications will be denied.

4. In the Initial Decision, the two applications of Advanced Communications Company were denied, and this applicant has filed no exceptions. Accordingly, pursuant to the provisions of Section 1.276(b) of the Commission's Rules, Advanced Communications' applications will be dismissed with prejudice for failure to prosecute.

5. Extensive disagreement has been engendered by the Examiner's decision to substitute different frequencies for the ones the applicants applied for. His reasons for doing this are explained in the Initial Decision. In part, the Examiner relies on the terms of Section 81.304 (b) (22) which provides that "to the extent practicable" the frequencies available to this service will be assigned according to a schedule of priorities. Therefore, he authorized the use of only three channels (26, 27 and 28), with 27 being assigned to three locations. This use of 27 would bring about extensive co-channel interference between Coast Mobilphone at Santa Barbara and Advanced Electronics at Palos Verdes, and between the latter and Dana Point Marine Telephone at Dana Point, if each of them operated as otherwise proposed in its application. Recognizing this, the Examiner conditioned the grants upon the applicants conferring with each other and the Commission staff "to determine if any modifications of antenna height, or location,

[3] *Colorado Radio Corp.* v. *FCC*, 73 U.S. App. D.C. 225, 118 F. 2d 24, 26.

are required to insure compliance with Section 81.105 of the Commission Rules. . . ." Section 81.105(a) reads:

> (a) Coast stations at locations separated by less than 150 statute miles, which transmit on a radio channel above 100 MHz, shall minimize any interference between the particular stations using the same radio channel above 100 MHz by a mutually agreeable time-sharing arrangement, subject to direction by the Commission if agreement cannot be attained by the involved station licensees. In addition, where practicable, such licensees shall use directive antennas to minimize interference between the particular stations.

6. Although the extent of interference (either with or without shadowing) between the stations assigned to Channel 27 by the Hearing Examiner was not adequately developed on the record, a reasonable judgment that the interference would be extensive can be made from examination of the service contours of these stations and the interference contour of Coast Mobilphone, which are depicted in record exhibits. Approximately 50% of Dana Point's service area is overlapped by the service area of Advanced Electronics, and approximately 50% of Advanced Electronics' service area is overlapped by the service area of Dana Point. Further, the service area of Coast Mobilphone would overlap approximately 5% of Advanced Electronics' service area, and the service area of Advanced Electronics would overlap approximately 20% of Coast Mobilphone's service area. With such substantial overlap of service contours, it is clear that the interference which would occur from the operation of these three stations using their requested power, antenna heights and sites on Channel 27 would be extensive, especially in the areas which Advanced and Dana Point plan to serve. Thus, it is unnecessary to remand the case to the Examiner on this question. Significantly, the coastal area which has the highest concentration of boating facilities would be included in the Advanced-Dana Point area of interference. To eliminate this interference would require drastic alteration in the proposals, in the case of Dana Point and Advanced, and such action would necessarily deprive some of the proposed service areas of such service.[4] A time-sharing arrangement is equally undesirable. The record contains no evidence that time-sharing would be feasible in this heavy traffic area and in a service where substantial holding times normally are involved.[5] It cannot be assumed that the high concentration of boating facilities previously mentioned could be adequately served with these limitations on service. In any event, the Board does not agree with the Examiner that so strict an application of the priorities listed in Section 81.304(b)(22) of the Rules is required or justified. The rule speaks of following the priorities "to the extent practicable," and the Board does not construe this to mean that they should be applied at the expense of the resulting service limitation discussed above which would require almost completely new proposals from the applicants involved. It is difficult to see how extensive delays in inauguration of service could be avoided. Further hearings would almost certainly

[4] To eliminate interference, the operating contours of the stations would need to be retracted to the point where neither station's 17 dbu contour is overlapped by the other station's interference contour, and in view of the extensive overlap of the Advanced and Dana Point 17 dbu contours, it can be inferred, since interference contours reach considerably beyond the 17 dbu contours, that to achieve interference-free service, substantial areas would have to be left without service from either station.

[5] Compare *Niagara Communications, Inc.*, 34 FCC 2d 361, 366 (1972).

be required. Moreover, Section 81.304(b)(22) refers to "the order of assignment" of channels and provides no basis for the assignment of the same frequency at points so close together that extensive interference problems are created.

7. One further aspect of the Examiner's decision to substitute other frequencies for those requested by some of the applicants requires discussion. He holds that the employment of more than three frequencies [6] would be wasteful and is undesirable for that reason. The Board disagrees under the circumstances of this case. It is important to keep in view the primary purpose of Class III mobile service, which is to provide a local service.[7] The significance which the Commission attaches to this objective was recently reaffirmed in the Report and Order amending Part 81.[8] The range of operation of stations using these VHF frequencies is limited, so that the need to assign them sparingly to save some for future demand at other locations is considerably diminished. As we view it, particularly in the context of the very heavy traffic expectations from the large and still expanding boating population in the Los Angeles-Southern California area, the primary aim should be to assure the availability of the needed service with the minimum amount of interference, and if achieving this requires the use of additional frequencies, the Board believes that such use would be consistent with Commission policy. Therefore, the Board does not accept the rationale that a substitution of frequencies is needed to restrict the number of assigned channels.

8. The criteria which the Board believes are important in deciding which assignments should be made and which applications should be granted have already been suggested above. To restate them, Commission policy is to make assignments and grants in such a way as to assure, as nearly as can be, reliable, interference-free service, oriented to the local boating localities in the Southern California area, with an intermixture so far as practicable of wireline telephone and land-mobile facilities. In attempting to apply these criteria the Board is aware that Class III mobile marine service on VHF frequencies is quite new and that the assignments being made in this proceeding will bring the first such VHF service to most of the boating localities in the Los Angeles-Southern California area. Thus, these assignments will comprise the basic Class III–B system for the area. It is not to be expected that every boating locality in the Los Angeles-Southern California area can be assigned a Class III–B station, and the aim of providing service which is primarily local therefore must be modified to the extent of assuring that the stations which are authorized, at least in this proceeding, are also capable of providing service to neighboring boating localities for which there are no specific applicants. The Board can find little justification for inaugurating this service with channel assignments the use of which will necessitate considerable further engineering and efforts to achieve agreement among the station licensees to avoid the occurrence of undesirable

[6] The Examiner was discussing the Southern California Marine Radio Council plan at this point. SCMRC proposed utilization of four channels.

[7] By definition, the purpose of a coast station is "to provide a maritime mobile service, primarily of a local character, ..." (Section 81.3(j) of the Rules.)

[8] *In the Matter of Amendment of Part 81 of the Rules, etc.*, FCC 72–557, — FCC 2d ——, released July 5, 1972. See particularly paragraph 7.

co-channel interference. The demand for service is very great, and it will be best provided if not burdened with unnecessary and ill-advised limitations from the outset.

9. The importance of bringing service to local boating communities, as has already been noted, was recently emphasized by the Commission in its Report and Order [9] adopting amendments to the applicable rules for this service. These changes do not become effective until August 14, 1972, so they do not govern this case. Nevertheless, the Report and the new rules are a restatement of the Commission's intent in establishing this service and allocating VHF frequencies to it and clearly show the direction in which Commission policy is pointed. In the course of discussing (in paragraph 7) some of the comments which were filed in that proceeding, the Commission had the following to say:

> We are retaining the basic concept, however, of a local public coast station every 30 miles in different localities in the interests of providing maximum VHF public correspondence facilities to the public. We believe, however, from the comments furnished in this proceeding that some misunderstanding may exist concerning the type of service that we intend for this class of station to provide primarily. The Class III (VHF) coast station is defined in Section 81.3(j) of our rules as a station licensed "to provide a maritime mobile service, *primarily of a local character* . . ." (emphasis supplied.) We recognize that a Class III station, because of an exceptionally high antenna located on a tall tower or building, or on a mountain, may have a greatly extended coverage area and operate over distances approaching "regional" in range and thereby provide, on a secondary basis, services that are not strictly "local" in the sense that we use the word in our rules. Such operation of a local station over an extended coverage area could be advantageous to the public in numerous ways. It does not, however, alter the basic character of the station of providing local service, primarily, when compared to the Class I and II stations, to a relatively small geographic area. Additionally, it should be remembered that the service provided by these radio stations [is] of a "two-way" nature in that calls can originate on board vessels or from points on shore to vessels. Thus, in determining the local area to be primarily served by a Class III station, consideration must be given not only to the radio signal propagation range of the station in relation to the vessel with which the station is communnicating, but also the location of the persons on shore with whom ship communications are being exchanged and the extent to which these persons are within, or near, the local exchange of the interconnected telephone company. In either case, we believe the cost should be minimized and not include any unnecessary telephone landline charges. If, a call to or from a vessel must be routed through a coast station located in a locality other than the one in which the person on shore is located, and possibly at a greater distance from the vessel, then a telephone landline toll charge must ordinarily be added to the radio link of the communication, as an additional expense. This results in an increase in cost to the public using this service and communication with vessels near the fringe of the signal propagation area could cause a decrease in the quality of the radio link of the communication. We believe the public interest requires that these consequences be avoided wherever possible by allowing for the establishment of adequate coast station facilities in as many localities as possible without wasteful duplication provided the localities have sufficient maritime activities to reasonably insure the economic viability and survival of the stations and provided the establishment of additional stations do not have an unreasonable adverse economic impact on existing stations.

10. Based on the foregoing considerations and others which will be discussed, the Board concludes that a grant of the following appli-

[9] See footnote 8, *supra*.

cations at the locations and on the channels indicated would best serve the public interest.

R.C.S., Inc	San Luis Obispo	26
General Telephone	Santa Barbara	25
Advanced Electronics	Los Angeles [1]	27
Pacific Telephone	Santa Catalina	26
Dana Point Marine	Dana Point	84

[1] At Palos Verdes which is located between the Redondo Beach area to the north and the Long Beach area to the south.

11. The record shows a need for VHF assignments at San Luis Obispo and at Santa Barbara,[10] although the number of boating facilities, and thus the presumed need, is somewhat greater at the latter location. The remaining applicants for these locations are R.C.S. at San Luis Obispo on Channel 26, Coast Mobilphone at Santa Barbara, also on 26, and General Telephone at Santa Barbara on Channel 25. R.C.S. and Coast Mobilphone could not both operate on 26 without suffering co-channel interference in an area to the west of Santa Barbara. The full extent of this area cannot be ascertained, but it would be relatively small in terms of total area. It would represent a small share of the total area R.C.S. would cover with its 17 dbu contour but a significant portion of the area encompassed by Coast Mobilphone's proposed 17 dbu contour. However, if the fact that the propagation path from R.C.S.'s transmitter site to the affected areas is largely over land is also taken into account, the areas subject to interference might be reduced.

12. Even without interference, Coast Mobilphone's service area would be limited, extending not more than about thirty miles from Santa Barbara. It would reach to but not include the three largest islands forming the south side of Santa Barbara Channel.[11] R.C.S. will serve a roughly semi-circular area, centered near San Luis Obispo, with a radius of approximately eighty miles, extending northward toward Monterey and covering much of the coastal area between San Francisco and Los Angeles. General, from its Santa Barbara site, would serve out to about fifty-five miles, including in its service area the Santa Barbara channel islands and considerable area seaward therefrom. It would also serve significant areas to the northwest and southeast of Santa Barbara, which are not reached by Coast Mobilphone's proposal.[12]

13. It is desirable that Santa Barbara and San Luis Obispo each have a station. San Luis Obispo had 230 berths and moorings in 1966 and Santa Barbara 690, and it is expected that boating facilities at both places will experience large growths.[13] At the present time, however, the facts do not warrant the assignment of more than one channel to either place, for the need, as reflected in the berths and moorings figures, is much smaller for them and the nearby localities than it is further down the coast. Grants to R.C.S. for San Luis Obispo and General at Santa Barbara would provide greatest coverage and the

[10] See Attachment 1 to the Initial Decision.

[11] Santa Cruz, the easternmost of the islands lies inside the 17 dbu contour; Santa Rosa, the middle island, and San Miguel, the westernmost island, are not inside this contour.

[12] Coast Mobilphone's 17 dbu contour would just reach the Oxnard-Ventura area which would be well within the service contour of General's station at Santa Barbara.

[13] By 1975, it is anticipated that there will be 700 vessels using radio service at San Luis Obispo and 1400 at Santa Barbara (including the Santa Barbara Islands).

most efficient frequency usage. The limited area which Coast Mobilphone would serve compared with the other two applicants makes a grant to it the least desirable. At this time, when the initial, basic system for the Los Angeles coastal area is being established, it is preferable to make assignments which assure adequate coverage, and this would not be achieved with a grant to Coast Mobilphone. A grant to Coast Mobilphone would almost certainly require the assignment of another channel to Santa Barbara, whereas a grant to General would not. In terms of frequency usage, then, a single grant to General is also to be preferred.

14. Moving southeastward along the coast, General requests authority to operate on Channel 24 at a point near Malibu, the site being approximately fifty-eight miles from its Santa Barbara transmitter. About 29 miles farther down the coast, Advanced Electronics has applied for a station at Palos Verdes Estates using Channel 27. The Advanced Electronics station would serve nearly all of the area that General would reach plus an additional area south and east of the southern and eastern limits of General's service contour. The statistics referred to earlier show that there is a much larger concentration of boating facilities in the vicinity of the proposed Advanced station than there are near Malibu. The largest concentrations in the Malibu area are not in Malibu itself but northwest about twenty-five miles in the area around Ventura and Oxnard which would already be covered by General's Santa Barbara station. In 1966, there were 1,040 salt water berths and moorings in and near Ventura and Oxnard compared with over 9,000 in the coastal area from Long Beach to Santa Monica. Advanced Electronics' site is centrally located in this latter area and would more nearly serve in the capacity of a local station than would General. Moreover, a grant to Advanced Electronics would help to achieve a balance between wireline and land-mobile services which is desirable, as the Examiner pointed out.

15. Dana Point Marine, operating on Channel 84, would duplicate the southeastern half of Advanced Electronics' service area and, in addition would cover the coastal area between Los Angeles and San Diego. It would offer the land-mobile type of service. In the area from San Diego to Alamitos Bay, which is southeast of Long Beach, there were over 10,000 salt water berths and moorings in 1966. To this area, Dana Point would provide the only land mobile type service.

16. Pacific Telephone is currently the only VHF Class III–B station in the Los Angeles area. It is applying for authority to move its transmitter from the mainland to Santa Catalina Island where it would continue operating on Channel 26.[14] Its coverage would include all of the coastal area from San Diego in the southeast to a point between Malibu and Oxnard in the northwest. Thus, it would provide service to the area in which boating activities are most concentrated. It would overlap more than one-half of the service area of Pacific Telephone's station in San Diego and most of the service area of the Advanced station at Palos Verdes, nearly all of the area which Dana Point would serve and a comparable amount of the service area proposed by General for Malibu. With its location on Santa

[14] There would be no interference or overlap problems between it and R.C.S., Inc. at San Luis Obispo.

Catalina Island, Pacific would serve as a local station for the large boating communities developing there [15] and would provide service oceanward to a distance of about seventy-five miles from Santa Catalina at the farthest point, including the outer Santa Barbara Passage [16] and beyond. Dana Point would serve much of the Passage, Advanced some of it, and General at Malibu a smaller portion than Advanced.

17. While, for the reasons already stated, we have concluded that Advanced is to be preferred over General's Malibu proposal, it is also the Board's opinion that as between the two wireline proposals, *i.e.*, General for Malibu and Pacific for Santa Catalina, the latter is to be preferred. Pacific's proposal is more centrally located to serve the heavy concentration of boating operations in the immediate Los Angeles area and can provide such service to a much greater area than General. As we have already noted, the local nature of the service is important, but the need to assure service to other localities without their own stations must also be recognized in an area such as Los Angeles and its environs. In such an area it is also important to have a wireline oriented service available in addition to that which is offered by land-mobile operators. With Pacific,[17] Dana Point and Advanced in operation, some areas will have as many as three services available to them, which is clearly warranted by the high concentration of boating facilities in this area. Between San Diego and Long Beach there were more than 10,000 berths and moorings in 1966 (6,400 radio users are expected by 1975) and most of this segment of the coast will receive three Class III–B services. From Long Beach to Santa Monica there were over 9,000 such facilities in 1966 (nearly 7,000 radio users are expected by 1975) and all of this part of the coast will have three services.

18. In making the grants indicated above, the Board has followed the proposal of the Examiner with only one exception, that being at Santa Barbara where we believe only one channel should be assigned at this time. The grants made here are, the Board believes, reasonably consistent with the policy recently announced by the Commission in the amendment of the rules applicable to Class III–B stations while also meeting in a satisfactory way the special problems posed by the great concentration of boating activities which exists in the Los Angeles-Southern California area. Thus, the stations are separated by more than thirty miles and though considerable overlap exists between some of them as has been detailed above, the reasons which we have found to justify the assignments despite the overlap are generally consonant with the new rules. In view of the findings and conclusions made herein and the requirement to expedite the authorization of additional Class III–B coast station facilities in this area, the Board does not believe that remand to the Examiner, as suggested by the Bureau, is necessary.

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[15] In 1966, there were more berths and moorings there than in either San Luis Obispo or Santa Barbara.

[16] Not to be confused with the area around Santa Barbara itself, including the Santa Barbara channel.

[17] At Santa Catalina and at San Diego.

19. Accordingly, IT IS ORDERED, That the following applications ARE GRANTED:

(a) Advanced Electronics, File No. 2391-M-P-35, Palos Verdes Estates, Los Angeles, California, Channel 27;
(b) General Telephone Company of California, File No. 2684-M-P-95, Santa Barbara, California, Channel 25;
(c) R.C.S., Incorporated, File No. 5283-M-P-88, Tassajera Peak, near San Luis Obispo, California, Channel 26;
(d) Dana Point Marine Telephone Company, File No. 5447-M-P-98, Santiago Peak, near Dana Point, California, Channel 84;
(e) Pacific Telephone and Telegraph Company, File No. 5615-M-RL-128, for renewal of existing public Class III-B coast station KMB-393, San Pedro, California, subject to the relocation authorized in subparagraph (f), *infra;*
(f) The Pacific Telephone and Telegraph Company, File No. 2729-M-P-105, to relocate public Class III-B coast station KMB-393 to Dakin Peak, near Avalon, Santa Catalina Island, California, Channel 26; and

20. IT IS FURTHER ORDERED, That the applications of Advanced Communications Company, File Nos. 5163-M-P-78 and 5162-M-P-68 ARE DISMISSED with prejudice for failure to prosecute; and

21. IT IS FURTHER ORDERED, That the remaining applications listed in the caption hereof ARE DENIED; and

22. IT IS FURTHER ORDERED, That the grants made herein are conditioned on the grantees securing any appropriate or required authorization from the California Public Utilities Commission.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER,
Member, Review Board.

APPENDIX A

Exceptions and related pleadings filed by parties:
By The Telephone Company, Inc. (Silver Beehive):
1. Exceptions, filed September 13, 1971.
2. Statement in Support of Exceptions, filed September 13, 1971.
3. Reply to Comments, filed October 1, 1971.
By General Telephone Company of California:
1. Exceptions, filed August 30, 1971.
2. Brief in Support of Exceptions, filed August 30, 1971.
By Chief, Safety and Special Radio Services Bureau:
1. Exceptions, filed August 18, 1971.
2. Memorandum in Support of Exceptions, filed August 18, 1971.
By Public Utilities Commission of the State of California:
1. Reply to Exceptions, filed September 13, 1971.
2. Reply Brief, filed September 27, 1971.
By Advanced Electronics, Coast Mobilphone Service and Dana Point Marine Telephone Company:
1. Statement in Support of Initial Decision, filed August 30, 1971.
2. Reply Brief to Exceptions of The Telephone Company, Inc., filed September 20, 1971.
3. Reply Brief re Exceptions, filed by the Chief, Safety and Special Radio Services Bureau, filed September 9, 1971.
By Coast Mobilphone Service:
1. Reply Brief, filed September 13, 1971.
By The Pacific Telephone and Telegraph Company:
1. Reply Brief to Exceptions of General Telephone Company, filed September 13, 1971.
2. Reply Brief to Exceptions of The Telephone Company, Inc., filed September 23, 1971.

APPENDIX B

RULINGS AND EXCEPTIONS

SAFETY AND SPECIAL RADIO SERVICES BUREAU

Exception No.	*Ruling*
1, 2, 3, 4, 5, 6, 7	*Granted* to the extent and for the reasons set forth in the Decision.

GENERAL TELEPHONE CO.

1	*Denied.* The Examiner's ruling was correct.
2, 3, 29	*Granted* to the extent and for the reasons set forth in the Decision.
4, 12, 13	*Denied.* The Examiner's Decision constitutes a reasoned analysis of the facts of record.
5	*Denied* in view of the denial of Coast Mobilphone's application in the Decision.
6, 11, 25, 27	*Granted.*
7, 8, 9, 10, 15, 17, 18, 19, 20.	*Denied.* The Examiner's finding adequately reflects the record facts.
14, 16, 24, 26, 28	*Denied* for the reasons set forth in this Decision.
21	*Denied.* This case cannot be fairly decided on the fact that some users may attempt to communicate with inadequate equipment.
22, 23	*Granted* to the extent modified in the Decision and otherwise *denied* as not supported by the record.

THE TELEPHONE CO., INC. (SILVER BEEHIVE)

1, 2, 4	*Denied.* The subject bears on the feasibility of applicant's proposal. See Decision.
3, 6, 20	*Denied* for the reasons set forth in the Decision.
5	*Denied.* The subject is relevant to the feasibility of the proposal and the Examiner's findings properly reflect the record facts.
7, 10, 12, 15, 16, 19	*Denied* for the failure to comply with the requirements of Section 1.277(a) of the Rules.
8	*Granted.* 1977 should read 1975.
9	*Denied.* Paragraph 26 of the Initial Decision does not refer to traffic figures submitted by Pacific Telephone. Such figures are referred to in paragraph 27, and they are not adopted as representative.
11	*Denied.* The Examiner properly states the question. *Denied* in other respects for reasons set forth in the Decision.
13, 14, 17, 18	*Granted* to the extent indicated in the Decision.

F.C.C. 71D-45

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
APPLICATION OF ROBERT L. MOHR D.B.A. ADVANCED ELECTRONICS FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT PALOS VERDES ESTATES, LOS ANGELES, CALIF.	Docket No. 18652 File No. 2391–M–P–35
APPLICATION OF GENERAL TELEPHONE CO. OF CALIFORNIA FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT MALIBU, CALIF.	Docket No. 18653 File No. 2683–M–P–95
APPLICATION OF THE PACIFIC TELEPHONE & TELEGRAPH CO. FOR A CONSTRUCTION PERMIT TO RELOCATE PUBLIC CLASS III–B COAST STATION KMB–393 FROM SAN PEDRO, CALIF., TO DAKIN PEAK, NEAR AVALON, SANTA CATALINA ISLAND, CALIF.	Docket No. 18654 File No. 2729–M–P–105
APPLICATION OF GENERAL TELEPHONE CO. OF CALIFORNIA FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SANTA BARBARA, CALIF.	Docket No. 18655 File No. 2684–M–P–95
APPLICATION OF COAST MOBILPHONE SERVICE FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SANTA BARBARA, CALIF.	Docket No. 18656 File No. 2602–M–P–75
APPLICATION OF THE TELEPHONE CO., INC. (SILVER BEEHIVE), FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED ON SANTA CRUZ ISLAND, CALIF.	Docket No. 18657 File No. 4879–M–P–48
APPLICATION OF THE TELEPHONE CO., INC. (SILVER BEEHIVE), FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED ON SAN CLEMENTE ISLAND, CALIF.	Docket No. 18658 File No. 4997–M–P–58
APPLICATION OF FRANCIS I. LAMBERT AND HARRY L. BROCK, JR., D.B.A. ADVANCED COMMUNICATONS CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT BROADCAST PEAK, NEAR SANTA BARBARA, CALIF.	Docket No. 18659 File No. 5163–M–P–78

APPLICATION OF FRANCIS I. LAMBERT AND HARRY L. BROCK, JR., D.B.A. ADVANCED COMMUNICATIONS CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT CUESTA GRADE PEAK, NEAR SAN LUIS OBISPO, CALIF.	Docket No. 18660 File No. 5162–M–P–78
APPLICATION OF R.C.S., INC., FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT TASSAJERA PEAK, NEAR SAN LUIS OBISPO, CALIF.	Docket No. 18661 File No. 5283–M–P–88
APPLICATION OF DANA POINT MARINE TELEPHONE CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III–B COAST STATION TO BE LOCATED AT SANTIAGO PEAK, NEAR DANA POINT, CALIF.	Docket No. 18662 File No. 5447–M–P–98
APPLICATION OF THE PACIFIC TELEPHONE & TELEGRAPH CO. FOR RENEWAL OF LICENSE OF EXISTING PUBLIC CLASS III–B COAST STATION KMB–393 AT SAN PEDRO, CALIF.	Docket No. 18663 File No. 5615–M–RL–128

APPEARANCES

Philips B. Patton, Esq., Arthur Blooston, Esq., and *Jeremiah Courtney, Esq.*, on behalf of Advanced Electronics, R.C.S., Incorporated, Dana Point Marine Telephone Company, and The Southern California Marine Radio Council; *H. Ralph Snyder, Jr., Esq., George A. Shortzer, Esq., Timonthy Fitzpatrick, Esq., A. M. Hart, Esq.*, and *Walter Rook, Esq.*, on behalf of General Telephone Company of California; *Dudly A. Zinke, Esq.*, and *Alfred C. Partoll, Esq.*, on behalf of The Pacific Telephone and Telegraph Company; *Arthur Blooston, Esq., Jeremiah Courtney, Esq.*, and *Tom Halde, Esq.*, on behalf of Coast Mobilphone Service; *Arthur W. Brothers*, on behalf of The Telephone Company, Inc. (Silver Beehive); *William H. Borghesani, Jr., Esq., David L. Hill*, and *Harry L. Brock, Jr., Esq.*, on behalf of Advanced Communications Company; *Rufus G. Thayer, Esq.*, and *Jeremiah Courtney, Esq.*, on behalf of The California Public Utilities Commission [A]; and *Terrence P. O'Brien, Esq.*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER FREDERICK W. DENNISTON

(Issued July 27, 1971; Released July 29, 1971)

1. These applications for VHF Public Coast III–B stations, the earliest of which was filed March 3, 1965, were designated for hearing by the Commission Order released September 15, 1969, 19 FCC 2d 601. They result from the major changes now in process in the maritime radio services impelled by the "population explosion" in recreational boating, and are designed to meet the accelerated demand for these services. This group of applications deal with proposed coast stations

[A] Appearance of Jeremiah Courtney, Esq. limited to special procedural matter only.

to be located at San Luis Obispo, California and southward, including offshore islands, and will be referred to collectively as the Southern California stations.

2. Prehearing conferences were held October 30 and December 3, 1969, and January 14, 1970. Following clarification by the Commission of the method of computing coverage areas,[1] 25 FCC 2d 13, hearings were held in Los Angeles, California, on November 19, 20, 23, 24, 25 and 30, December 1, and 2, 1970. The record was closed by Order released December 9, 1970 (FCC 70M–1678).

PRELIMINARY STATEMENT

3. These twelve applications for Class III–B Public Coast stations collectively propose VHF ship-to-shore service along a continuous stretch of the California coast from approximately the 36° of latitude, north of San Simeon, California, southerly to the Mexican border, and beyond, and including the coastal areas around Los Angeles. Various overlaps of coverage areas, and of co-channel interference, incident to the proposals led to their designation for hearing (19 FCC 2d 601).

4. One of the applications is for renewal of the license of the Pacific Telephone and Telegraph Company (PT&T), for an existing VHF station, KMB–393 (Channel 26), located at San Pedro; another is for a construction permit for a PT&T station on Santa Catalina Island, which, if granted, would result in the present KMB–393 being moved to that location. Certain of the proposals are for location of transmitters on the islands of Santa Cruz and San Clemente.

5. In addition to the eight separate applicants, the Safety and Special Radio Services Bureau of the Commission, the California Public Utilities Commission (PUC), and the Southern California Marine Radio Council (SCMRC), actively participated in the proceeding, and the latter two and the applicants offered testimony.

PROCEDURAL MATTERS

6. The Hearing Examiner took under advisement a motion by PT&T and General Telephone to strike certain testimony of Robert L. Mohr, d/b as Advanced Electronics, dealing with the availability of existing foreign exchange trunks which would allow toll-free calls from a wide area of greater Los Angeles to ships (Tr. 1609). Other parties subsequently testified as to toll free areas, and the motion was not further pressed. Such testimony was admissible and the motion to strike is denied herein.

7. Also taken under advisement was a motion by General Telephone to dismiss the Santa Cruz Island application of Silver Beehive (Docket No. 18657), for the reason that the longitudinal coordinate of the proposed antenna location on that island is in fact 30 seconds removed from the location specified in the amended application. The witness for Silver Beehive contends that a typographical error occurred in the application in that 58 seconds of West longitude was specified, whereas

[1] Coverage is to be computed in accordance with standards set forth in the Notice of Proposed Rule Making in Docket No. 18944, adopted August 26, 1970, FCC 70–894.

the correct figure is 28 seconds. Moreover, it is contended that the altitude utilized in the compilation of coverage, 1808 feet, confirms the 28 seconds location, whereas the 58 seconds site is at a substantially different height. Section 1.962(c)(4) of the Commission Rules defines a change in antenna location of greater than five seconds as a substantial amendment; it is concluded, however, that in the light of the explanation given, the application was in error by typographical mistake and that no one has been prejudiced thereby. Accordingly, the motion to dismiss is denied.

BACKGROUND

8. These applications are the outcome of the Commission's program to effect improvement in radio telephony and safety communications in the maritime mobile service, dictated by the rapid growth in noncommercial or recreational boating. In effect, that program involves the shifting of short range communications to VHF and reserving the present medium frequency (MF) band for longer distances with conversion from Double Side Band (DSB), to Single Side Band (SSB). *Channel Spacing 156–162 Mc/s Band*, 13 FCC 2d 874; *Maritime Mobile Stations*, 23 FCC 2d 553.

9. The timing of the foregoing changes is of importance to this proceeding. Effective January 1, 1972, any vessels newly equipped with radio must utilize VHF; thereafter, existing DSB could be continued in use for a period of five years, but beginning January 1, 1977, use of the 2 Mc/s band will be limited to SSB and then, only if the ship station is also equipped with VHF. In view of the relative high cost of SSB equipment, it is expected that relatively few recreational boats will be so equipped. By January 1, 1977, when the DSB would be outlawed entirely, it is anticipated that 200,000 currently licensed MF transmitters on vessels will have been replaced by VHF.

10. The VHF Public Coast III–B stations, such as here proposed, will form the backbone of the new VHF public correspondence and safety system. Each such authorized station must provide service on and maintain watch on the distress, safety and calling frequency, 156.8 Mc/s; Section 84.104(b)(2) and 81.191(c)(2) of the Rules. They accordingly play a vital role in safety of life at sea. As this requirement applies to all licensees in this service, the discussion herein will generally relate only to the services proposed in public correspondence channels, of which there are nine available for assignment (Section 81.304(b)(22) of the Rules).

REDISTRIBUTION OF FREQUENCIES GRANTED

11. Because of the proposal by SCMRC that there be a reassignment of frequency grants [2] among the applicants, an Order released May 21, 1971 (FCC 71M–809), directed the filing of supplemental briefs on the legality of such a procedure, but not limited to that specific plan. The question appears to be a novel one.

12. Simply stated, the question is whether, assuming the record so warranted, the individual applicants could be assigned channels other

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12. Simply stated, the question is whether, assuming the record so warranted, the individual applicants could be assigned channels other

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than as applied for but within the group embraced in the applications. If applicant A seeks channel 26 and applicant B channel 28, could 26 be granted to B and 28 to A, assuming both were agreeable? The impact of Section 309 is crucial to the question.

13. In response to the order, the SCMRC, the California Public Utilities Commission and all of the applicants, save PT&T and General (the latter specifically endorsing the Bureau position), support the proposition that the Hearing Examiner may re-distribute the channels in recommending grants. The Bureau and PT&T appear to oppose the proposition outright but, unfortunately, deal with the question on postulates not necessarily required.

14. These applications, designated for hearing in September 1969, were filed over a 4½ year period beginning in March 1965. The Commission requirements have undergone change in that period and the entire area of marine communications is in the process of conversion to the new VHF band.

15. For the reasons hereafter stated, the Hearing Examiner is of the opinion that, where a group of applicants seeks assignment of a group of frequencies which have been subjected to the application and public notice requirements of Section 309, it is permissible to reassign these frequencies sought, if there are strong public interest considerations.

16. The Supplemental Briefs elicited interesting positions. Silver Beehive (now The Telephone Company), which was a dissenter from the SCMRC Plan, nevertheless supports the basic authority to reassign the frequencies. PT&T and General, on the other hand, both of which concurred in that plan, nevertheless now appear to contend it would be unlawful.

17. The position of the Bureau, General and PT&T is predicated solely on the question of amendment, either required by the Hearing Examiner or voluntarily submitted by the applicant. So viewed, it would appear that in either event, a major amendment is involved (Section 1.962(c) of the Rules), which would subject the applications, at this late date, to a new 30 day public notice requirement and a possibility of petitions to deny under Section 309 of the Act, thus removing them from the hearing "umbrella". We are dealing here, however, with a different question which the parties have not confronted, i.e., whether the Commission may grant a frequency different from that originally sought, not the power to require or approve amendments.

18. SCMRC proposes that to meet any question of Section 309(b) of the Act and Section 1.962(f) of the Rules, the Hearing Examiner should make recommended modified grants which would be made the subject of a new 30 day public notice during which petitions to deny could be filed, but which, according to SCMRC "would be more in the nature of petitions for reconsideration". While this solution appears ingenious, if not ingenuous, it appears unnecessary.

19. The purpose of Section 309 is to provide a 30 day period when all segments of public interest may be apprised of pending applications. As to these applications, each has been the subject of public notices giving the frequencies proposed and identifying the applicants. Thus, the general public and potential licensees have received the required notice.

20. The Commission has recently pointed out that it has wide discretion to adopt flexible procedures, rules and orders to meet ever-changing communications needs, citing Sections 4(e) and (j) and 303(r) of the Act and numerous court decisions, *Specialized Common Carrier Services*, Docket No. 18920; First Report and Order released June 3, 1971, FCC 71–547. In the instant case, Issue (c) is how may the need "best be filled under existing conditions."

21. The Hearing Examiner, therefore, concludes that he may, if public interest considerations would be furthered, redistribute the channels granted among these applicants, but not necessarily in the manner recommended by SCMRC.

JURISDICTIONAL QUESTION

22. The California PUC initially urged that a certificate of public convenience and necessity from that Commission is a prerequisite for the applications here considered. This Commission denied this request while not questioning the PUC jurisdiction over such operations as are intrastate in character, and provided that any authorizations granted herein will be conditioned on the applicant obtaining any required authorization from the state (Designation Order, para. 9).

23. In elaborating on its original contention in its Proposed Findings of Fact and Brief, the California PUC asserts not only its licensing authority but economic control as well, viewing the FCC licensing authority as merely "technical" and citing Sections 2(b), 3(e), 3(u),[3] and 221(b) of the Communications Act. The issues in this proceeding do not require any resolution of this question inasmuch as any grants made herein will be conditioned on the recipient obtaining any required authorization from the California PUC as provided in the Designation Order herein, paragraph 10.

FINDINGS OF FACT

The Applications

Silver Beehive Telephone Co., Inc., Dockets 18657 and 18658

24. As they would blanket the entire area here considered, it is necessary to consider these applications as a threshold issue. The company, a small telephone company operating in Utah, changed its name to "The Telephone Company, Inc." during the course of the proceeding but will generally be referred to herein as Silver Beehive. It also holds a construction permit for marine VHF public correspondence station on Lake Mead, near Las Vegas, Nevada, and its president, A. W. Brothers, holds a similar license in his own name on Lake Tahoe.

(a) *Changes in application:* The San Clemente Island application, Docket No. 18658, filed May 13, 1968, proposed operations on frequencies 161.8 and 161.850,[4] channels 24 and 25. By subsequent amend-

[3] Cited as Sections 152(b), 153(e), and 153(u), which is the numbering in Title 47 of the U.S. Code.

[4] As noted elsewhere, all applicants propose operation on the Safety, Calling and Distress channel 156.8 (channel 16), as they are required to do so by regulations and reference is made only to the proposed public correspondence channels.

ment, filed February 17, 1969, the frequencies sought were changed to 161.950 and 161.875 (channels 27 and 85), but for unaccountable and unexplained reasons the Commission's Designation Order, paragraph 2, specified the channels sought in the original application. The record discloses no reason for this Commission having ignored the amendment, but in view of the Designation Order, Silver Beehive prepared its evidence and prosecuted the application, on the basis of the original frequencies, channels 24 and 25. Under the circumstances, the latter are the channels deemed to be sought.

(b) *Automatic vs. Manual System:* By amendments filed February 17, 1969, Silver Beehive specified that both proposed stations would be fully automatic dial systems described as Improved (multichannel) Radio Signaling System (IRSS), with manual capability. At the hearing, its witness abandoned that plan and has reverted to the original proposal for a manual system (Tr. 988), although no amendment to this effect was, or subsequently has been, offered. A motion was made, and taken under advisement, to return the applications to the processing line under Section 81.28 of the Rules (Tr. 993). Such a change, however, appears to be defined as a minor amendment under Section 1.962(d) of the Rules and, accordingly, that motion is hereinafter denied. The instant applications will be treated as being for manual operation only.

(c) *Operator agreement with Pacific:* An essential ingredient of the Beehive proposals is the use of Pacific's operators under operating agreements with Pacific. Pacific's witnesses testified, however, that the company would be unwilling to enter into such agreement. Beehive offered no alternative method of operation.

(d) *Operational links:* The Beehive proposal contemplates that the unattended transmitters and receivers on Santa Cruz and San Clemente Islands will be interconnected with each other and the mainland by 72–76 Mc/s operational radio links under Section 81.601 of the Rules. These links have not been applied for and the record does not establish whether Beehive could meet the conditions of such operations specified in Section 81.603(b).

(e) *Site availability:* The proposed transmitters would be located on the off-shore islands of Santa Cruz and San Clemente, the former privately owned, the latter under U.S. Navy control. Silver Beehive has the consent of neither for the proposed operation and as to Santa Cruz, which is privately-owned, has positive opposition from the owners. Silver Beehive could obtain that site only through condemnation, which would require it to first obtain classification as a common carrier from the California PUC (which, as noted below, seems highly unlikely), and court proceedings of an indeterminate period. Moreover, Silver Beehive would be required to seek permission from this Commission to transfer any licenses issued to it to a California corporation as that would be a prerequisite under California law.

(f) *State certification:* Silver Beehive is the only one of the applicants which has already sought approval of the California PUC. That application was denied after hearing, by order of July 7, 1970, on the grounds the radio operation proposed was not economically feasible, even though it was also found that "The record so clearly reveals

that there is a need for VHF maritime mobile radio service in the waters of Southern California that we need not set out in detail the evidence on the subject." The California Commission went even further by memorializing this Commission in a Formal Resolution (No. L–104), urging that there be no delay "by hearing the application of Silver Beehive" and expressing the opinion that the "public interest would not be served by FCC consideration of the application of Silver Beehive". While this suggestion that Silver Beehive be denied a hearing which is required by statute and precedent is unworthy of consideration, in weighing the merits of these applications, it is nevertheless a practical consideration, especially in the light of the question of site availability and the condition that this Commission has specified, i.e., that any licenses be conditioned on the obtainment of a required State license. The apparent prejudgment indicated by the PUC resolution indicates that Silver Beehive could not expect to gain the necessary common carrier status in California to support a condemnation suit, or to comply with the condition imposed by this Commission, except after lengthy litigation, if ever. The Hearing Examiner, therefore, reluctantly concludes that even if construction permits were granted to Silver Beehive, "facilities" are not now available to it or will be in any reasonable period in the future. This is especially true in the light of the other shortcomings of the proposals as discussed above. Accordingly, these applications must be denied and will not further be considered in the following comparative evaluations.

The Remaining Applications

25. Collectively, these applications and an existing PT&T station at San Diego, would provide VHF radio coverage of a continuous stretch of approximately 400 miles of California coastline, including areas among the highest in density of boating in the world. The Bureau divides the area into three major locales and they will be so treated here. From the north, these locales are, respectively, San Luis Obispo, Santa Barbara, and Los Angeles.

A. *San Luis Obispo:* Advanced Communications (Docket No. 18660), is a partnership consisting of Francis I. Lambert and Harry L. Brock, Jr., based in Alexandria, Virginia, from which it would conduct the business through a local answering service; but if the business became large enough Brock, one of the partners, would locate on the West Coast.

(1) The transmitter would be at Cuesta Pass, at an elevation of 2,735 feet, on an existing tower, and would provide coverage, centered on San Luis Obispo, in an arc extending seaward from the coast of Lucia, California (approximately 36° of latitude), nearly 90 miles out and to a point on the coast in the vicinity of Santa Barbara. Service would be provided on the safety and calling frequency, 156.8 Mhz (Channel 16), and on 161.90 Mhz (Channel 26). The latter is the same as that proposed by RCS, Inc., and hence, the two would create mutually destructive interference. As noted below, Advanced Communications also proposes a station in the Santa Barbara area, also on Channel 26, and the two combined would provide coverage of an extensive portion of the area under consideration.

(2) Advanced Communications' remote transmitter site would be connected with an answering service, yet to be selected, by landline if available, or by a microwave link. No plan of operation, proposed rates, or traffic estimates were presented.

(3) RCS, Inc., is an existing radiotelephone common carrier with answering service and message center located in San Luis Obispo. It would integrate its proposed marine service (Docket No. 18661) with its land mobile services. It intentionally proposes the same frequency (Channel 26) as Advanced Communications had previously filed, inasmuch as it believes there is only enough business to justify one operator in the area.

(4) RCS, Inc., would also have a high level transmitter on Tassasera Peak, 2,835 feet, about seven miles from its offices and central point, and approximately the same coverage as Advanced Communications.

(5) RCS, Inc. agrees with the SCMRC "plan", herein discussed, only to the extent that there should be but one station in the San Luis Obispo area, and if it is the successful one, it would agree to a different channel being assigned. Advanced Communications, on the other hand, suggests in its Proposed Findings that Channel 26 be assigned to it and Channel 27 to RCS, Inc.

B. *Santa Barbara:* The applicants in the Santa Barbara area are: Advanced Communications (Docket No. 18659), proposing Channel 26; General Telephone Company (Docket No. 18655), Channel 25; and Coast Mobilphone Service (Docket No. 18656), Channel 26.

(1) Advanced Communications transmitter would be at Broadcast Peak, outside of Santa Barbara, at an elevation of 4,127 feet. There would be co-channel interference with R.C.S., Inc. in San Luis Obispo, in an area ranging from that city down the coast to a point between Arlight and Concepcion. Similar interference exists on the south with PT&T's proposed new transmitter on Santa Catalina Island in the Los Angeles area. Moreover, it would completely blanket the proposal of Coast Mobilphone with unacceptable interference; the vastly greater antenna height would extend its signals in an arc approximately three times greater than the latter's contour, or up to 92 miles against 32 miles. While Advanced Communications filed its application after that of Coast Mobilphone, it was not aware of that previous filing. No data on rates or expected traffic was submitted.

(2) General Telephone would provide service on Channel 25 at Santa Barbara, through its Santa Barbara Traffic Office, from which it now handles land mobile, air-to-ground, and other types of traffic. It has trained personnel and now provides service to vessels in the Santa Barbara area by endorsement to its land mobile authorization. The service area would be from a point on the coast north of Santa Monica, extending seaward beyond Santa Rosa and San Miguel Islands, and reaching the coast at Arlight. It will charge $1.00 for the initial three minutes of call, and 30 cents for each additional minute, any long distance charges to be added.

(3) Coast Mobilphone, on Channel 26, would integrate its proposed operation with its present land mobile operations dating from 1954, in connection with which it has been servicing vessels since 1965, under endorsement of that license. It is certificated by the California PUC as a

public utility telephone company and will provide interconnected landline service with General Telephone. Its charges for marine calls will be 75 cents per 3 minute call, plus 25 cents for each additional minute; calls would be handled in the Santa Barbara exchange area with the addition of any toll rates to or from points beyond. Messages will be held and relayed, a service which many prefer, being similar to the service rendered in land mobile service. Coast would accept a channel other than 26 and approves the SCMRC Plan.

C. *Los Angeles:* There are proposed in this area the following applications: By Pacific, renewal of its KMB–393 (Channel 26) license and relocation on Santa Catalina; General Telephone, a proposed station at Malibu (Pt. Dume), Channel 24; Mohr, d/b as Advanced Electronics, at Palos Verdes Estate, Channel 27; and Dana Point Marine at Santiago Peak, Channel 84.

(1) Pacific has been providing VHF service in the area since 1952, through KMB–393, Channel 26, as well as through KOU, a Medium Frequency station. At the present San Pedro location, the VHF service is shadowed by high ground in parts of Santa Monica Bay and areas around Santa Catalina Island. The move of the transmitter will improve these situations without any degradation of service.

(2) Traffic volume has been growing, having tripled from 1960 to 1969. The present public correspondence channel is occupied less than 50% and Pacific does not feel a second channel would be required until the occupancy rate exceeds 50%, or in several years. However, the traffic data and projections of the same witness indicate a 58% rate as of July 1971, which is estimated would reach 90% by July 1972. The witness considered that ratio too great and conceded a second channel would be required, although Pacific has not sought it.

(3) Pacific has rendered excellent service in the past, although congestion at times requires delay in communication, and as noted, some areas are shadowed by the present location of the transmitter, a situation which would be rectified by its move to the proposed Santa Catalina Island location. It does not offer message holding and forwarding services.

(4) General Telephone proposes a transmitter at Malibu (Channel 24), which will be operated through the Bundy Traffic Office serving the Santa Monica Exchange. It has experienced personnel and renders mobile and air-to-ground service. Based on surveys, it anticipates 650 customers for its proposed service (including Santa Barbara) area and a proposed 5,000 calls annually. It does not believe one channel could serve this much business. Its charges would be the same as at Santa Barbara.

(5) Mohr, d/b as Advanced Electronics, proposes a transmitter at Palos Verdes Estates, Channel 27. Advanced operates an extensive sales and service organization in electronic equipment and services over 10,000 units in the Los Angeles area. Mohr is owner of a VHF public coast station in Hawaii, and, in addition, renders two-way land mobile and one-way paging service there. In servicing VHF equipment, Mohr has found that the present KMB–393 signal is not usable at some points and, where good, is congested, requiring a delay in making tests. Further, the lack of message holding and forwarding service, which he would provide under his proposal, is wasteful of

channel facilities as re-calls are required. The Advanced proposed operation would be run in conjunction with its present telephone answering service and radio telephone common carrier operation. Charges for marine calls would be 50 cents for the first two minutes or fraction, and 25 cents for each additional minute; any landline charges would be in addition, but on shore-to-ship calls from the greater Los Angeles area, there would be toll free calls as Advanced has two foreign exchange lines in connection with its present operations. Advanced accepts the SCMRC Plan.

(6) Dana Point Marine proposed a transmitter on Santiago Peak, Channel 84, which would blanket the entire Los Angeles area in an arc from north of Santa Monica Bay, seaward beyond San Clemente Island, to south of San Diego. It considers the present VHF service from San Pedro to be non-existent in its primary service area, Orange County, south of Los Angeles. Its charges would be 50 cents for a two-minute call, and it expects to operate at a loss for at least two years. Message forwarding service, which it proposes to offer, is necessary to achieve better utilization of the channel; interconnection with land lines will be provided and calls can be made in the Orange County area without the present toll charges which apply when calling via San Pedro.

TRAFFIC ESTIMATES

26. All the evidence presented points to phenomenal growth in recreational boating, with a concomitant growth in the use of marine radio. The most detailed and authoritative study was offered by witness John D. Quinley on behalf of the California Public Utilities Commission (Attachment 1 hereto). Based on studies made by the Department of Harbors and Watercraft, State of California, the study indicates available facilities for 22,340 craft in berths or moorings, as of December 1966, in the areas here under consideration. It is estimated further, that by 1975, these facilities will have increased by over 100%, or to 51,150, to meet the demand. Finally, on the assumption that 35% of vessels will be radio-equipped to use public correspondence channels, 17,900 vessels will require maritime radio service in this area by 1977. When coupled with a projected growth of 25% due to greater channel availability and better VHF coverage, Quinley estimates that there will be 130,000 calls in the area annually, including both 2 Mhz and VHF.

27. Pacific, based on experience of the existing VHF Station KMB–393 and the MF Station KOU, constructed estimates which are shown in tabular form as Attachment 2 hereto. Pacific estimates that for July 1972 at the relocated KMB–393 on Santa Catalina, the following increases will occur over the July 1971 figures at the present location—number of registered vessels from 300 to 470 (a 56% increase) : annual calls from 9,000 to 14,100 (a 56% increase) ; and annual messages (completed messages) from 6,300 to 9,870 (a 56% increase). It estimates that a second public correspondence channel will be required by July 1972, although it is not here seeking the second channel.

28. Other applicants offered estimates lacking in detail but all pointing to a great increase in demand for service. General, for example, anticipates 5,000 calls annually.

29. The Bureau adopts the estimate of the California PUC as appropriate, as does the Hearing Examiner.

DISCUSSION

30. The record is conclusive that there is urgent need for adequate VHF coverage of the coastal and off-shore areas under discussion. Except as to Silver Beehive, separately discussed herein, the applicants collectively offer to provide the required service. The question essentially is how, on a comparative basis, this can best be provided with minimum use of the total of nine public correspondence channels available.

31. The growth in recreational boating is phenomenal and there is no indication of decline in the amount of commercial boating. The highly sensitive role played by marine radio in safety of life at sea dictates that there be available the best possible facilities as soon as possible. Moreover, the public convenience and necessity will be greatly enhanced by the availability of VHF public correspondence channels and ready connection with the telephone systems.

32. Essentially, there are two types of applicants involved here—the existing wire-line telephone companies, PT&T and General Telephone (designated by the California Commission as Wire Line Utilities), and companies engaged in providing land-mobile services (designated as Radio Telephone Utilities). The Bureau and the California PUC would limit the grants herein to the wire line companies, except at San Luis Obispo, which is beyond the areas proposed to be served by the wire line companies. But the record clearly shows that the boating public requires the holding of messages and forwarding services offered by the RTU's but not by the wire line companies, which offered no reason for their failure to offer the service and merely belittle the need therefor.

33. The use of holding and forwarding techniques clearly result in more efficient use of the allocated frequency since it minimizes the amount of channel occupancy incident to unproductive and repeated no-answer calls by vessels calling numbers on land, the direction in which most of the traffic is destined. In addition, restricting service to the wire line companies would appear to contravene the recent policy pronouncement of this Commission on competition in *Specialized Common Carrier Services*, —— FCC 2d ——, Docket No. 18920, released June 3, 1971, FCC 71–547.

34. In any event, aside from possible benefits to be derived from competing services, the record clearly demonstrates a need for both types of services.

35. It is obvious that KMB–393 (Channel 26) is, and has been providing an essential service and that its license should be renewed until such time as it may become operational at the new Santa Catalina Island site from which it can provide even better service. Additionally, the application of Pacific for the latter facility should be granted.

36. The SCMRC proposal would utilize both wire line and radio telephone utilities, but is wasteful of frequencies inasmuch as it would involve allocation of Channels 24 and 84, in addition to 26 and 28 (the latter being the existing San Diego channel), whereas only one addi-

tional channel is required at this time. The plan has merit, however, and is adopted herein with modification. The reason for selection of Channels 24 and 84 by certain applicants and embodied in the SCMRC Plan is not explained of record and is contrary to the priority of assignment system of Section 81.304(b)(22) of the Rules under which Channels 26 and 28 are interchangeable as the first priority, succeeded in order thereafter, by Channels 27, 25, 24 and 84.

37. A suitable modification would result if PT&T is granted the renewal of its present KMB–393 Channel 26, and its relocation on Santa Catalina Island, and Channel 26 is repeated at San Luis Obispo, where distance will prevent co-channel interference; that Channel 28, now used by PT&T at San Diego, be repeated at Santa Barbara, and that Channel 27, the next in order of priority be used for coverages of the intervening areas rather than Channels 24 and 84 as proposed by SCMRC.

38. SCMRC indicates there may be uncertainty with respect to possible co-channel interference at the spacing of Channel 84 proposed, including the need for reduction in antenna heights, which cannot be resolved on this record. It is assumed the same questions are posed with respect to Channel 27 herein authorized. There appears to be no reason, however, to withhold disposition of the basic issues herein in view of the long pendency of these applications, and the imminence of the first of the critical dates, January 1, 1972, following which all new marine installations, for practical purposes, must be of VHF. Accordingly, the grants herein will be appropriately conditioned to insure clarification of the problem of co-channel interference on Channel 27, including possible modification of antenna sites and heights.

CONCLUSIONS

Issues 13 (a) and (b)

39. The record establishes that the applicants have proposed facilities and services which will serve the public interest, convenience and necessity, and that the rates proposed for the marine calls are at or below the present level of charges. The total cost of calls to or from inland points, including toll charges, vary widely depending on the points called and no overall conclusion can be reached absent specific data on calling patterns, but the multiple choices afforded by the grants proposed herein will tend to minimize the cost to the users. The anticipated growth in VHF use indicates adequate traffic to support the grants, and there is no indication of diversion from or revenue loss to the existing KMB–393, as presently located or prospectively relocated.

Issue 13(c)

40. The need for VHF Public Coast Service in the area considered is urgent and the need can best be filled under existing conditions by the system of grants provided herein which will assure the boating public not only continuous coverage along the coast area, but will provide a choice between direct calls only and holding and forwarding service.

Issues 13 (d) and (e)

41. KMB–393 can satisfactorily exchange communications with vessels in a substantial area radiating from San Pedro, but with some areas now shadowed by high land masses, a condition which will largely be corrected by the relocation of the transmitter on Santa Catalina Island. There is almost total overlap between the service area of the proposed station of Advanced Communications (Mohr), by both the present and proposed locations of KMB–393, but there is no evidence there will be adverse economic effect on that station. Moreover, the single channel proposed by Pacific would not be adequate to meet the need indicated by its own studies, and the second channel is therefor required.

Issue 13(f)

42. Other than the possible co-channel interference alluded to above by the Channel 27 stations, no co-channel interference is indicated. The condition imposed herein will result in elimination of any that might be found with respect to Channel 27.

Issue 13(g)

43. The public interest, convenience and necessity requires the renewal of Pacific's KMB–393 license for Channel 26, its relocation on Santa Catalina Island, and the re-use of Channel 26 at San Luis Obispo, where the preferred applicant is R.C.S., Inc., it being an established land-mobile operation, with which the marine service will be integrated, in contrast with the only partially developed plan of Advanced Communications which would be operated by absentee management. It further requires the grant of Channel 28 to General Telephone at Santa Barbara, and of Channel 27 to Advanced Electronics at Palos Verdes Estates, to Coast Mobilphone at Santa Barbara and to Dana Point Marine at Dana Point (Santiago Peak). All other applications should be denied.

ULTIMATE FINDINGS

In view of the foregoing, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules:

1. The application of Pacific Telephone and Telegraph Company, Docket No. 18663 (File No. 5615–M–RL–128), for renewal of license of KMB–393 (161.9 Mc/s, Channel 26), IS GRANTED, on condition that it be surrendered for cancellation at such time as the station on Santa Catalina Island begins operation.

2. The application of Pacific Telephone and Telegraph Company, Docket No. 18654 (File No. 2729–M–P–105), for a construction permit for relocation of KMB–393 (161.9 Mc/s, Channel 26), on Santa Catalina Island, IS GRANTED.

3. The application of R.C.S., Incorporated, Docket No. 18661 (File No. 5283–M–P–88), for a construction permit for a new public class III–B coast station near San Luis Obispo on Channel 26, 161.90 Mc/s, IS GRANTED.

4. The application of General Telephone Company, Docket No. 18655 (File No. 2684–M–P–95), for a construction permit for a new public class III–B coast station at Santa Barbara, IS GRANTED on condition it accept Channel 28, 162.0 Mc/s, in lieu of Channel 25, 16185 Mc/s.

5. The application of Robert L. Mohr, d/b as Advanced Electronics, Docket No. 18652 (File No. 2391–M–P–35), for a construction permit for a new public class III–B coast station at Palos Verdes Estates, Los Angeles, Channel 27, 161.95 Mc/s, IS GRANTED subject to the condition in paragraph 8 below.

6. The application of Sylvan B. Malis, d/b as Coast Mobilphone Service, Docket No. 18656 (File No. 2602–M–P–75), for a construction permit for a new public class III–B coast station at Santa Barbara IS GRANTED, on condition it accept Channel 27, 161.95 Mc/s in lieu of Channel 26, 161.90 Mc/s, and subject to the further condition specified in paragraph 8 below.

7. The application of Dana Point Marine, Docket No. 18662 (File No. 5447–M–P–98), for a construction permit for a new public class III–B coast station near Dana Point IS GRANTED, on condition it accept Channel 27, 161.95 Mc/s, in lieu of Channel 84, 161.825 Mc/s, and subject to the further condition specified in paragraph 8 below.

8. The authorizations granted by paragraphs 5, 6 and 7 above are subject to the condition that these applicants shall immediately confer with each other and with the Commission staff to determine if any modifications of antenna height, or location, are required to insure compliance with Section 81.105 of the Commission Rules, and shall conform to all Commission requirements before the licenses hereby authorized are issued.

9. The following applications ARE DENIED:

Applicant	Docket No.	File No.
General Telephone Co.	18653	2683–M–P–95
The Telephone Co., Inc. (Silver Beehive)	18657	4879–M–P–48
The Telephone Co., Inc. (Silver Beehive)	18658	4997–M–P–58
Advanced Communications Co.	18659	5163–M–P–78
Advanced Communications Co.	18660	5162–M–P–78

10. The motions described in paragraphs 6, 7 and 24(b) above ARE DENIED.

11. A condition of each of the licenses granted herein is that the applicant secure from the California Public Utilities Commission an appropriate or required authorization.

12. To the extent not granted herein, all other applications ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON,
Hearing Examiner.

ATTACHMENT 1

Estimates of 2 MHz and VHF radiotelephone equipped vessels by 1975 which can be expected to use public correspondence service

Region and area [1]	Covering	Salt water berths and moorings			Vessels using public correspondence service in 1975 [4]
		Existing December 1966 [1]	Additions to 1975 [2]	1975 total [3]	
7D	San Diego to Oceanside	3,400	3,320	6,720	2,350
7CS	San Clemente to Newport Bay	4,370	3,440	7,810	2,700
7CN	Sunset Bay and Alamitos Bay	2,600	1,230	3,830	1,350
7BS	Long Beach to San Pedro	5,360	7,480	12,840	4,500
7BN	Redondo Beach to Santa Monica	3,680	3,310	6,990	2,450
7J	Catalina Island [5]	970	1,580	2,550	900
7A	Ventura-Oxnard	1,040	3,450	4,490	1,550
5C	Santa Barbara	690	3,180	3,870	1,350
5C	Santa Barbara Islands [5]		100	100	50
5B	San Luis Obispo	230	1,720	1,950	700
	Total	22,340	28,810	51,150	17,900

[1] Inventory of boating facilities, December 1966, Department of Harbors and Watercraft, State of California.
[2] Inventory of proposed boating facilities to 1975, August 1967, Department of Harbors and Watercraft, State of California.
[3] Berths and moorings may be estimated for intervening years by assuming a straight-line growth of additions between December 31, 1966, and June 30, 1975.
[4] Assumes 35 percent of berthed and moored vessels is a reasonable estimate of the number of vessels that will use public correspondence channels. Thirty-five percent of berths and moorings estimated for June 30, 1969, between San Diego and Santa Barbara (10,800) agrees closely with 10,000 vessels listed to use 2 MHz service (Station KOU) in 1969 and small number of vessels using VHF services. (See also the "Role of Public Correspondence" in the VHF Maritime System, Richard E. Sefton: Presented at RTCM Symposium, May 16-18, 1967.)
[5] Largely moorings for visitors.

ATTACHMENT 2

KMB-393—Traffic projections

	Actual				Forecast	
	July 1969	July 1970	August 1970	September 1970	July 1971	July 1972 [1]
Registered units	124	211	219	230	300	470
B. H. seconds/R. U	7.6	9.0	8.2	7.8	7.0	7.0
B. H. seconds total	[2] 940	[2] 1,900	[2] 1,800	[2] 1,800	[2] 2,100	[2] 3,290
B. H. seconds capacity	3,600	3,600	3,600	3,600	3,600	3,600
Percent use busy hour	26	52	50	50	58	90
Channels required	1	1	1	1	1	2
B. H. calls total		6-7	6-7	6-7	7-8	13-14
Average hold time per call—minutes		4.7	4.3	4.3	4.7	4.7
Busy day calls/R. U	.14	.12	.20	.10	.20	.20
Busy day calls total	17	25	44	25	60	94
Busy month calls/R. U	3.5	3.2	4.3	3.5	3.5	3.5
Busy month calls total	437	685	946	946	1,050	1,650

	1969	1970	1971	1972
Annual calls/R. U	31	30	30	30
Annual calls total	3,823	6,300	9,000	14,000
Annual messages total	2,723	4,400	6,300	9,870

[1] Santa Catalina location.
[2] "Peak days" traffic only.

F.C.C. 72-754

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 89, 91, AND 93 OF THE COMMISSION'S RULES CONCERNING USE OF LAND MOBILE FREQUENCIES ABOARD AIRCRAFT.	Docket No. 19545

SECOND MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has under consideration a petition for partial reconsideration of its Memorandum Opinion and Order and Notice of Proposed Rule Making adopted in the above-entitled proceeding July 12, 1972 (FCC 72-625). The Notice proposes amendment of our Rules to proscribe the licensing of land mobile radio facilities for operations on board aircraft except where the aircraft are an integral part of a land-based operation involving land vehicles which require direct communication with the aircraft. Basically, the amendment is designed to prevent harmful interference to land operations that would likely result from use of land mobile facilities on aircraft. In connection with its proposal, the Commission ordered that applications pending or filed during this proceeding for land mobile facilities on board aircraft be deferred until final action is taken in the proceeding.

2. The petitioners are Air Logistics, Inc. and Air Marine, Inc., two helicopter service companies who, before adoption of our Order, submitted applications for licensing of air-to-ground radio communications operations in the land mobile services in connection with Gulf Coast oil drilling operations. They contend that the proposed restriction on aircraft operations should not be made applicable to their helicopters as they had placed reliance, in establishing their business and obtaining their aircraft and communications equipment, upon present rules and policies that do not specifically prohibit the licensing of the low-flying, short-range type of aircraft operations they provide. They request reconsideration of that portion of our Order which postpones action upon their applications.

3. A similar issue to that raised by petitioners is involved also in about six additional applications, received before our Order was adopted, which propose land mobile operations on board aircraft for such limited flying activities as crop and insect spraying, emergency hospital helicopter service, and ranch surveillance. These applications

are also affected by our "freeze" Order and they are, therefore, being considered in connection with the petitioners' request.

4. To support their request, petitioners argue that their aircraft operations would be conducted below an altitude of 500 feet, at relatively slow speeds, and within a well-defined constricted area, and that this limited type of operation has been regularly authorized in the land mobile service without undue adverse effect upon land-based activities. Consequently, they maintain that they were entitled to rely on existing rule provisions and that "the freeze imposed on petitioners' applications with virtually no prospect of obtaining a grant if the proposed regulation is adopted is, at the very least, highly inequitable and unnecessary to the achievement of the Commission's objective." They ask "that the portion of the Commission's Memorandum Opinion which relates to the freeze precluding action on petitioners' applications be reconsidered and petitioners' applications granted."

5. The Commission agrees that the applications under consideration herein should be acted upon at this time and, accordingly, the petitioner's reconsideration request is granted. The Commission further finds that licensing of the requested land mobile facilities is warranted. We have attached considerable importance in this respect to the fact that the reliance placed by the applicants upon our present rules, which do not explicitly preclude our licensing of aircraft operations on land mobile frequencies, was justified and entitled them to commit themselves to establishment of land mobile systems. Further, as stated in our Notice, the Commission regards the interference potential from these types of small craft operations as "somewhat limited" so that the regular land mobile operations should not be severely affected by the few additional aircraft systems involved in these applications.

6. In accordance with the foregoing, the Commission's Order which deferred action on pending applications for land mobile facilities on board aircraft is modified to permit consideration and grant of the applications discussed herein. Licenses issued would be subject to appropriate written conditions to limit mobile units actually installed in aircraft by requiring that operations be on a non-interference basis with respect to regular land mobile operations and by restricting operations to aircraft while they are flying below 500 feet and within specified areas.

7. This action does not apply to applications received after publication of our Notice in this proceeding or to applications for other types of aircraft operations involving more extensive long-range and high altitude flight activities. These latter applications, and the appropriate action to be taken with respect to our proposed rule amendment, will be considered in connection with the Commission's report on its Notice in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R–204

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BERWICK BROADCASTING CORP., BERWICK, PA. For Construction Permit	Docket No. 17884 File No. BPH–5812

MEMORANDUM OPINION AND ORDER

(Adopted August 1, 1972; Released August 2, 1972)

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a Petition for Reimbursement for Out-of-pocket Expenses Incurred in Preparation of its Application for an FM Construction Permit, filed June 14, 1972, by Berwick Broadcasting Corporation (Berwick).[1] A short statement of the background of this proceeding will serve to place the instant petition in perspective.

2. The mutually exclusive applications of Berwick and P.A.L. Broadcasters, Inc. (P.A.L.) for new FM broadcast stations at Berwick, Pennsylvania and Pittston, Pennsylvania, respectively, were designated for hearing by Commission Order, FCC 67–1289, released December 19, 1967. On April 26, 1968, the parties filed a joint petition for approval of agreement, looking toward a dismissal of the Berwick application and grant of the P.A.L. application. That petition was denied by the Review Board by Memorandum Opinion and Order, FCC 68R–316, released July 29, 1968 (14 FCC 2d 132, 13 RR 2d 1073), since there were certain unresolved character qualification issues as to Berwick. On September 26, 1968, the parties again filed a joint petition for approval of agreement and grant; however, this petition specified that Berwick would dismiss its application immediately with the approval of reimbursement to be held in abeyance pending resolution of the character qualifications issues. The Board found that the parties had complied with all of the relevant requirements of the Commission's Rules, and that approval of the agreement, dismissal of the Berwick application with reimbursement to be held in abeyance pending resolution of the character qualifications issues, and grant of the P.A.L. application were in the public interest.

3. The qualifications issues as to Berwick arose out of the activities of Mr. Roy M. Cohn and Mr. Thomas Bolan, each of whom was a 25% stockholder in the applicant corporation. Berwick's instant petition is based upon the fact that as of April 8, 1971, the Commission granted an application for transfer of control which permitted Mr. Edward Newman to acquire the shares of Messrs. Cohn and Bolan. Petitioner

[1] The Board also has before it comments on petition for reimbursement for out-of-pocket expenses, filed by the Broadcast Bureau June 23, 1972, and Berwick's reply to the Bureau's comments, filed July 11, 1972.

contends that now there is no bar to its reimbursement since Cohn and Bolan are no longer associated with the corporation. Citing *Grayson Television Company, Inc.*, 13 FCC 2d 916, 13 RR 2d 952 (1968), Berwick therefore requests the Board to approve reimbursement without further hearing.

4. The Broadcast Bureau opposes the petition. In opposition it notes that the unresolved issues are as follows:

> 1. To determine whether Berwick Broadcasting Corporation submitted complete and accurate information in response to the Commission's application Form 301, and has continued to keep the Commission apprised of "substantial and significant changes" as required by Section 1.65 of the Commission's Rules.
>
> 2. To determine the effect of *Securities and Exchange Commission* v. *Fifth Avenue Coach Lines, Inc.*, 67 Civ. 482 (S.D.N.Y., 1968) on the eligibility of Berwick Broadcasting Corporation to receive reimbursement.
>
> 3. To determine the effect of the final determination in *Herbert Braash* v. *Victor Muskat, et al.*, index No. 67–3745, filed September 27, 1967, in the United States District Court, Southern District of New York; *Edward Lawson et al.* v. *Baltimore Paint and Chemical Corporation et al.*, index No. 18497, filed July 20, 1967, in the United States District Court, District of Maryland; and various indictments returned and Civil Complaints filed against Roy M. Cohn[1]; on the eligibility of Berwick Broadcasting Corporation to receive reimbursement. (FN omitted)
>
> 4. To determine, in light of the evidence adduced with respect to the foregoing issues, whether approval of the reimbursement provisions of a joint agreement between P.A.L. Broadcasters, Inc. and Berwick Broadcasting Corporation, filed September 26, 1968, would be consistent with the public interest. (Review Board Memorandum Opinion and Order 20 FCC 2d 711 [0], released December 5, 1969).

The Bureau points out that Cohn's disassociation from the corporate applicant does not resolve the first issue which raises questions of the applicant's failure to disclose certain factual information concerning Mr. Cohn at the time the application was filed and to subsequently advise the Commission of changes in the situation with respect to Cohn. The Bureau does not address itself specifically to those issues which are based entirely on the outcome of certain court actions in which Cohn is listed as defendant.

5. The Board agrees with the Bureau that issue 1 is not resolved by Cohn's departure from the corporation. Since an adverse resolution of that issue could reflect on Berwick's character qualifications, the Board cannot now approve reimbursement to Berwick.[2] The *Grayson* case, *supra*, relied on by the petitioner, is not, in our view, applicable here. In that case, character qualifications issues were specified inquiring into the alleged misconduct of a principal who had withdrawn. Unlike here, no issue running directly to the conduct of the applicant had been specified.

6. Accordingly, IT IS ORDERED, That the Petition for Reimbursement of Out-of-pocket Expenses Incurred in Preparation of Application for FM Construction Permit, filed by Berwick Broadcasting Corporation on June 14, 1972, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] *Publix TV Corp.*, 33 FCC 98 (1962), *Miss Lou Broadcasting Corp.*, 11 FCC 2d 589, 12 RR 2d 222 (1968); *1400 Corp. (KBMI)*, 11 FCC 2d 575, 12 RR 2d 302 (1968); *George T. Hernreich*, 26 FCC 2d 723, 20 RR 2d 912 (1970).

F.C.C. No. 2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST BY CITIZENS COMMUNICATIONS CENTER
For Inspection of Annual Financial Reports

JULY 24, 1972.

1. By letter of June 6, 1972, the Citizens Communications Center (CCC) has requested that its counsel be permitted to inspect the annual financial reports (FCC Forms 324) filed by Metromedia, Inc. (Metromedia) for station KTTV–TV, Los Angeles, California, for the years 1969, 1970 and 1971. The information is sought for use by CCC in connection with a petition to deny KTTV–TV's application for renewal of license. The petition was filed by CCC in behalf of the National Association for Better Broadcasting (NABB), Action for Children's Television (ACT), Mexican American Political Association (MAPA), and the Fair Housing Council of San Fernando Valley (FHC). Metromedia submitted an opposition to CCC's inspection request on June 14, 1972.

2. The request is filed pursuant to Section 0.461 of the Commission's Rules since, as recognized by petitioners, annual financial reports are protected from routine availability for public inspection under Section 0.457(d)(1)(i) of the Rules (47 CFR § 0.457(d)(1)(i)) unless a persuasive showing as to the reasons for inspection is made.

3. From the information contained in the above letters, it appears that Metromedia filed an application for renewal of license for station KTTV–TV on September 3, 1971 and that CCC filed a petition to deny the renewal on November 15, 1971. Metromedia filed an opposition to the petition to deny on February 17, 1972. The petition is now pending before the Commission and CCC has not filed a reply to Metromedia's opposition.

4. Petitioners contend their request for the 324's should be granted because it satisfies the four criteria the Commission has indicated it would evaluate in determining whether a "persuasive showing" has been made, namely, the "relevancy and materiality" of the information requested, the "reasonable necessity" for the requesting party's obtaining the information, the "position of the station in the proceeding involved," and the inability to obtain the requested information from public sources. (See *Multivision Northwest, Inc.*, 8 F.C.C. 2d 892, affirmed 10 F.C.C. 2d 391 (1967); *Sioux Empire Broadcasting Co.*, 10 F.C.C. 2d 132 (1967); *KOWL, Inc.*, 24 F.C.C. 2d 305, 306 (1970); and *Alianza Federal de Pueblos Libres*, 31 F.C.C. 2d 557, 558–9 (1971).) To substantiate their basic contention, petitioners submit

that the licensee's response to their petition to deny has put the financial information in the requested 324's in issue.[1] To illustrate this, they cite language from Metromedia's pleading in which, in response to petitioner's allegations of programming inadequacies, the station urges the Commission to ". . . examine KTTV's performance in the light of its income picture" and to compare it to the "huge profits" of the three network stations. To make the same point, they also cite the following statement from Metromedia's opposition:

> Commission records reflect that [KTTV has not been siphoning off profits]. They also reflect that the large profits in this market are being made by the network owned stations. The rate of return for Metromedia on capital invested has been less than the Commission permits a public utility to make.[2]

Metromedia disagrees and asserts, among other things, that petitioners have cited the wrong precedents and that the Commission's decision in *Alianza*, *supra*, in which it denied the request to inspect the 324's is controlling and requires that petitioners' inspection request be denied. As an additional basis for denying petitioners' request, Metromedia urges that even if the relevancy of the reinvestment of profits issue was to be conceded, the annual financial reports would not provide specific enough information to evaluate the relationship between its revenues and its expenditures for local programming.

5. Metromedia's reliance on the ruling in *Alianza*, however, fails to take into account the fact that the stations whose 324's were requested had not attempted to use or rely upon any confidential financial information contained in them. Thus the present situation is readily distinguishable from *Alianza* because here the party against whom disclosure is sought has decided to actively contest petitioners' allegations concerning the amount of profits and revenues it has available for local programming. As indicated above, Metromedia has responded to petitioners' allegations by pleading, among other reasons, the constraints of its revenues as the rationale for the amount of local programming it provides, and by inviting the Commission to verify its statements and to compare its performance in this area to that of the three network owned stations.

6. It is apparent from the circumstances in which petitioners' request is made that they are not proposing a new standard for disclosure of confidential financial reports and that their request should be granted. The Commission has consistently permitted inspection of such reports in analogous situations when the party against whom disclosure was sought had put them in issue in the proceeding by relying upon con-

[1] Petitioners also urge an independent ground for establishing the relevancy of the requested information to the proceeding. They note that the percentage of profits a station reinvests in community programming is one of the proposed standards in the *Notice of Inquiry* in Docket 19154, 27 F.C.C. 2d 580, released February 23, 1971, *Further Notice*, 31 F.C.C. 2d 443 (August 20, 1971) and that the station has asked the Commission to judge its past performance by some of the new standards proposed in that inquiry. Petitioners submit that because Metromedia has invoked some of the proposed standards, it must accept all of them.

[2] Metromedia contends that petitioners have taken these statements "out of context," that they have "conveniently ignored significant portions" of its pleading, and that its statements were intended to demonstrate "that petitioners had failed to meet the statutory standard for a petition to deny." The licensee's intent notwithstanding, an examination of the whole text conveys the impression that the station is arguing that its revenues do not permit it to do more local programming and that the Commission should examine its 324's in order to verify KTTV's allegations.

109-008—72——3

fidential information they contained.[3] Here the station's own allegations have set forth a financial rationale for its local programming. Hence, even though the degree of profit reinvestment in community-oriented programming is not ordinarily in issue in evaluating a renewal applicant's past performance, the licensee's own assertions have made the Form 324 information relevant and material to the review of the renewal application. While Metromedia is perfectly correct that it was the petitioners who first sought to raise the reinvestment of profits issue, it was the licensee that decided to go beyond statements indicating that its past performance and proposed program service were sufficient to serve the needs of the community, and to defend its record on community oriented programming by indicating that it "has not been siphoning off profits." In short, it is clear that the licensee's attempt to establish a causal connection between its profits and revenues and its program service has caused the confidential information in its 324's to be in issue in this proceeding, and that the line of argument adopted has given rise to a "reasonable necessity" on petitioners' part for access to the requested reports.

7. Nor does Metromedia's argument that the requested financial reports do not contain precise enough information to support petitioners' allegations offer a persuasive basis for withholding the information. It is evident that Metromedia believes this information to be sufficiently reliable for purposes of its own contentions, and no reason appears why petitioners would be unable to use it similarly. In any event, as indicated above, the licensee should not be permitted to have it both ways, that is, on the one hand request the Commission to examine its "performance in the light of its income picture" and, on the other hand, insist that petitioners' counsel be denied access to the information needed to meet the specific allegations offered by the licensee in defense of its record.

8. In view of the above, it appears that petitioners have made the requisite persuasive showing under the Commission's rules and decisions for release of the requested financial reports. Petitioners have demonstrated that the information they seek is relevant and material to the issues of this proceeding and they have shown that it is reasonably necessary for them to have it in order to respond to allegations made by the renewal applicant. Accordingly, it being clear that the information requested is not available to petitioners from other sources, their request for inspection of KTTV–TV's annual financial reports for the years 1969, 1970 and 1971 is granted pursuant to Section 0.461 (c) (4) of the Commission's Rules and subject to Section 0.461 (d) (2) of such rules.

Arrangements to inspect the requested reports may be made with my office.

FEDERAL COMMUNICATIONS COMMISSION,
JOHN M. TORBET, *Executive Director.*

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[3] See *Multivision, supra*, which involved the question of the possible impact of the importation of distant television signals by a CATV system. Compare *Cape Cod Broadcasting Co.*, 23 F.C.C. 2d 277 (1970) with *Sioux Empire*, supra; both of these decisions dealt with the Carroll issue, i.e., the economic ability of a market to support additional stations.

F.C.C. 72R-200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of LOUIS C. STOCKARD, D.B.A. COASTAL ELECTRONICS CO., 3635 CALDER AVENUE, BEAUMONT, TEX. Order To Show Cause Why the License for Radio Station KLA-242 in the Business Radio Service Should Not Be Revoked	Docket No. 19384

ORDER

(Adopted July 28, 1972; Released July 31, 1972)

BY THE REVIEW BOARD: BERKEMEYER AND KESSLER AS A BOARD.

1. The Review Board having under consideration the request to accept late filed exceptions to the Initial Decision herein, filed on July 25, 1972 by the Safety and Special Radio Services Bureau;

2. IT APPEARING, That good cause has been shown for the filing of exceptions one day late;

3. IT IS ORDERED, That the request to accept late filed exceptions IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 72-763

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TONY P. CONGUISTA, CLEVELAND, MISS. For Renewal of Broadcast License for Station WDSK, Cleveland, Miss.	File No. BR-3735

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it for consideration: (a) the above-captioned application for renewal of license of Station WDSK, filed by Tony P. Conguista (licensee); (b) a Petition to Deny the above-captioned license renewal application, filed on June 22, 1970, by the Triangle Broadcasting Company, Inc. (Triangle); (c) a Supplement to the Petition to Deny, filed on July 10, 1970, by Triangle and, (d) the licensee's Opposition to the Petition to Deny, filed on December 8, 1970.

Background

2. Briefly, by way of background, we note that the license renewal application for WDSK was timely filed on March 3, 1970. Thereafter, on June 22, 1970, Triangle Broadcasting Co., Inc., licensee of Station WDRU(FM), Drew, Mississippi, filed a Petition to Deny WDSK's license renewal application.[1] Triangle alleged, in substance, that the licensee of WDSK had falsified the station's composite week logs prior to the submission of his renewal application with the Commission. Further, in a Supplement to the Petition to Deny, filed July 10, 1970, Triangle also alleged that the licensee of WDSK had made misrepresentations to the Commission, in that the licensee indicated that certain community leaders were consulted to ascertain the problems of Cleveland whereas, in fact, at least seven of the leaders listed were not interviewed.

3. After several requests for extensions of time, the licensee of WDSK filed an Opposition to Triangle's Petition to Deny on December 8, 1970. In essence, the licensee admitted to Triangle's charges. Additionally, on January 5, 1971, the licensee filed an amendment to

[1] On February 18, 1970, the Commission adopted a proposed rulemaking for the allocation of a new FM channel in Drew, Mississippi, a short distance from Cleveland. Triangle was organized for the purpose of operating this station. WDSK filed comments in opposition to the proposal on April 3, 1970. On June 15, 1970, WDSK filed a further pleading alleging that Triangle had organized an economic boycott of WDSK in Drew. Triangle's Petition to Deny was filed seven (7) days later, on June 22, 1970.

WDSK's license renewal application wherein various corrections were made with regard to his responses to Part 1 of Section IV–A, which pertains to the issue of ascertaining community problems. To date, Triangle has not filed a reply to the licensee's opposition pleading or Section IV amendment.

Procedural Questions

4. Complete details concerning Triangle's charges and the licensee's responses thereto are set forth below. First, however, we note that Section 1.580(i) of our rules, 47 C.F.R. 1.580(i), requires that a petition to deny a license renewal application be filed on or before the first day of the last full month preceding the license expiration date of the station involved. WDSK's license was scheduled to expire on June 1, 1970. Thus, a petition to deny WDSK's license renewal application was required to be filed on or before May 1, 1970. Since Triangle's petition to deny was not filed until June 22, 1970, it fails to meet the requirements of Section 1.580(i) with respect to timeliness and is thus procedurally defective. This fact, of course, warrants dismissal of Triangle's petition to deny. Nevertheless, in view of the allegations raised, we have decided to consider Triangle's petition to deny on its merits.

Statement of Facts

5. As noted above, Triangle's petition and the supplement thereto raise several questions concerning alleged misrepresentations made to the Commission by the licensee of WDSK in his renewal application. Specifically, Triangle alleges that WDSK's renewal application composite week logs were falsified by the licensee's station manager, Mrs. Veneshia Robinson, prior to their submission to the Commission. To substantiate this allegation, Triangle has submitted the affidavit of Mr. Edgar Alan Carter, a former employee of WDSK and Mrs. Robinson's ex-son-in-law. In short, Carter states that a number of public service announcements on WDSK's composite week logs were not broadcast by the station but, rather, were added to the logs by Mrs. Robinson before the application was submitted to the Commission. Also, in its supplement to the petition to deny, Triangle submits the affidavits of seven people listed in WDSK's renewal application as being consulted by the licensee in ascertaining community problems. Each of the affiants states that he was not consulted by station personnel in relation to the licensee's ascertainment survey.

6. In his opposition, the licensee of WDSK does not deny Triangle's allegations. Instead, by way of explanation, the licensee states that, although WDSK's announcers are required to log regional and national PSA's broadcast, this was seldom done. Therefore, Mrs. Robinson took it upon herself to make corrections in the station's composite week logs so that they would better reflect what she believed had actually been aired by the station. By way of affidavit attesting to the veracity of the opposition pleading, Mrs. Robinson states that these additions were made on the basis of her knowledge of seasonal PSA schedulings and by using lists she had prepared when the PSA announcements were prepared for broadcast. It is also stated that these

additions were made solely by Mrs. Robinson without the knowledge or consent of the licensee, nor did she make any attempt to determine the correct procedures to inform the Commission of unlogged PSA's. Finally the licensee states that the station's logs do give a true picture of the *local* public service announcements broadcast by the station.

7. Concerning Triangle's survey allegations, again the licensee does not deny these charges. Instead, the licensee states that he prepared a list of people to be contacted and instructed Mrs. Robinson to call each person listed to inquire about community problems. The licensee states, however, that Mrs. Robinson was unable to complete several of these calls, and, believing that Mr. Conguista had already spoken with the individuals listed, added these names to the survey without first consulting him. The pleadings also detail the contact both Mrs. Robinson and the licensee have had with each of the affiants during 1969 and 1970 in an effort to show that in the small Cleveland community, station contact was maintained with each of the people listed although not specifically in relationship to a formal interview. We also note that the renewal application has been amended to correct the errors in the survey.

8. Finally, the licensee states that after Mrs. Robinson became aware of the magnitude of her misconduct, she did offer to resign from her position as general manager. Conguista states, however, that he did not accept her resignation, since he believed that her behavior was prompted, in part, by difficult family stresses and personal problems which are detailed in the pleadings. In conclusion, Conguista states that by this experience, Mrs. Robinson has been made fully and forcefully aware of the need for complete candor in all representations made to the Commission.

Conclusions

9. Section 309 of the communications Act of 1934, as amended, 47 U.S.C. 309, provides, in substance, that if a substantial and material question of fact is presented or if the Commission for any reason is unable to find that a grant of an application would be consistent with the public interest, convenience and necessity, the Commission ". . . shall formally designate the application for hearing. . . ." In this case, the licensee acknowledges that WDSK's general manager added to the station's composite week program logs a number of public service announcements prior to the submission of the station's renewal application with the Commission. The licensee also acknowledges that several of the community leaders listed as being consulted were not actually interviewed by WDSK's general manager.

10. Hence, the only question in this proceeding is whether the licensee's admitted misconduct was intended to deceive the Commission in order to gain license renewal. In view of the circumstances set forth herein, we do not believe that the licensee's actions should be characterized as willful mispresentations. See Mark Twain Broadcasting Co., 21 RR 239 (1968), 29 FCC 313 (1960). However, as pointed out in Continental Broadcasting, 15 FCC 2d 120, 131 (1968):

> . . . the Commission must insist upon the effective exercise by the licensee of actual control over station operation and management, and it is only by holding the licensee accountable for the operation and management of the station that there can be any assurance that the operation and management will be respon-

sible. The degree of responsibility imposed and the standard of conduct required are the same for all licensees, irrespective of their form or the relative size of their operation.

11. We conclude that designation of WDSK's license renewal application for hearing is not warranted. Nonetheless, it must be made clear that our determination does not condone the admitted lack of control exhibited by the licensee. WDSK's license is scheduled to expire on June 1, 1973. Therefore, in renewing WDSK's license for the remainder of its term, it is emphasized that we consider this to be a short-term renewal, and we will closely scrutinize the operations of the station when the next renewal application is filed to determine whether these shortcomings have been effectively remedied.

12. Accordingly, IT IS ORDERED, That the petition to deny filed by Triangle Broadcasting Company, Inc., against the license renewal application of Station WDSK is hereby DENIED.

13. IT IS FURTHER ORDERED, That the application of Mr. Tony Conguista for renewal of license for Station WDSK is hereby GRANTED for a short-term expiring June 1, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-212

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DOWRIC BROADCASTING CO., INC., BRUNSWICK, GA.	Docket No. 19448 File No. BP-18331
JAMES HARRY MOYE, WAYCROSS, GA.	Docket No. 19449 File No. BP-18469
INTEGRATED BROADCASTING CO., INC., JACKSONVILLE, FLA.	Docket No. 19450 File No. BP-18493
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 7, 1972; Released August 9, 1972)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT

1. The above-captioned mutually exclusive applications were designated for hearing by Commission Memorandum Opinion and Order, FCC 72-16, released February 24, 1972, 37 FR 4376, published March 2, 1972. Among the issues specified was a staffing issue against James Harry Moye (Moye).[1] Presently before the Review Board is a petition to enlarge issues, filed March 17, 1972, by Integrated Broadcasting Company, Inc. (Integrated), which seeks the addition of a Section 73.37(a) overlap issue against Dowric Broadcasting Company, Inc. (Dowric) and a financial qualifications issue against Moye.[2]

Section 73.37 Issue

2. Section 73.37(a) of the Commission's Rules provides that no application for a new standard broadcast station will be accepted if there would be overlap of the proposed 0.5 mv/m signal strength contour with the like contour of another station operating on a frequency separated by 10 kHz. According to the affidavit of Integrated's consulting engineer, Dowric's proposed 0.5 mv/m contour will overlap the like contour of standard broadcast Station WNMT, Garden City, Georgia. This allegation is based on field intensity measurements taken on the N-186°-E radial of WNMT. This overlap, asserts petitioner, would be within 13 miles of Brunswick, Dowric's proposed city of license, and consists of approximately 97 square miles. In petitioner's view, an overlap issue is therefore required.

3. Dowric opposes the requested issue, urging that Integrated's measurements were taken on a radial only 11 miles of which constitutes

[1] The issue reads: "To determine whether the staff proposed by J. Harry Moye is adequate to effectuate his proposal."

[2] Also before the Board are: (a) opposition, filed April 17, 1972, by Dowric; (b) opposition, filed April 18, 1972, by Moye; (c) comments, filed April 18, 1972, by the Broadcast Bureau and (d) reply, filed April 27, 1972, by Integrated.

solid ground; the remaining 34 miles of the signal path is entirely over salt marshes. It further submits that Integrated's more distant measurements were made in salt water rivers or creeks. Dowric next asserts that, according to its measurements, the 0.5 mv/m contour of WNMT does not encompass the area predicted by Integrated, and that, of the predicted 97 square miles of overlap, 57 square miles cover salt water marshes or other uninhabited areas. Finally, Dowric asserts that the abnormally high tide conditions which existed at the time Integrated's engineer measured the WNMT contour resulted in unrealistic measurements. In view of the foregoing and the fact that the only area of possible overlap is uninhabited, Dowric, citing *Collier Broadcasting Co.*, 25 FCC 2d 867, 20 RR 2d 365 (1970), urges denial of the requested issue. The Broadcast Bureau is of the opinion that a substantial showing, warranting addition of the requested issue, has been made by Integrated that an adjacent channel overlap of the two 0.5 mv/m contours will occur, but adds that the asserted overlap area of 97 square miles cannot be supported on the basis of a single measured radial. In reply, Integrated argues that Dowric failed to rebut the allegation that there would be some overlap with WNMT's 0.5 mv/m signal, and, therefore that the question of prohibited overlap should be resolved at the evidentiary hearing.

4. The Board is of the opinion that the measurement data submitted by Integrated raises a substantial question as to whether Dowric's proposed 0.5 mv/m contour overlaps the 0.5 mv/m contour of WNMT in contravention of Rule 73.37. See *TV Cable of Waynesboro*, 18 FCC 2d 1055, 16 RR 2d 1093 (1969). *Cf. George E. Worstell*, 32 FCC 2d 280, 23 RR 2d 145 (1971). Dowric's contention that the salt water path accounts for the overlap can best be considered in the hearing in conjunction with the Commission's holding in *Cape Cod Broadcasting Corp.*, 3 FCC 2d 695, 7 RR 2d 509 (1966). Moreover, Dowric's measurements were not made in substantial compliance with Section 73.186 of the Commission's Rules and are therefore unacceptable. See *Lake-Valley Broadcasters*, 38 FCC 622, 4 RR 2d 913 (1965). Respondent has neither submitted population data to substantiate its claim that the overlap area would affect only a few persons nor has it alleged any other "unusual circumstances" to justify a waiver of Rule 73.37. See *Collier Broadcasting Co., supra; Larson-Irwin Enterprises*, 6 FCC 2d 613, 9 RR 2d 553 (1967). See also *Frank M. Cowles*, 21 FCC 2d 165 (1970).

Financial Issue Against Moye

5. Integrated next requests that a financial qualifications issue be added against Moye to determine whether he has available sufficient funds to construct and operate his proposed station. According to a June 4, 1971 amendment to his application, Moye's projected construction and first year operating costs are estimated as follows:

Down payment	$1,542.48
Lease payments due during first year ($771.24 per month)	8,483.64
Costs of construction of buildings	6,000.00
Professional fees	2,000.00
Cost of first year's operation	51,250.00
Total funds needed for construction and operation for 1 year without revenues	69,276.12

To meet these expected costs, Moye relied on the following available funds:

Cash on hand	$13,650.00
Cash value of life insurance	7,950.00
Loan from United Federal Savings & Loan Association (net of $5,000 estimated first year's debt service)	85,000.00
Funds available for construction and operating costs the first year	106,600.00

In addition, Moye's balance sheet as of May 18, 1971 indicates the following:

Assets:	
Cash on hand	$13,650.00
Commissions receivable	7,650.00
Savings (security pledges)	3,287.76
Cash value—Life insurance	7,950.00
Vehicles—3 cars, 1 pickup, 1 tractor, 1 mobile home	13,800.00
Livestock	700.00
Payments and expense—Radio station application	5,979.20
Deferred notes receivable	14,038.50
Current notes receivable	22,000.00
Real estate—Schedule 1	427,000.00
Total	487,055.46
Liabilities and net worth:	
Accounts payable	$2,025.00
Notes payable and mortgages	62,559.00
Note payable to Mr. A. V. Kennedy (open)	10,000.00
Notes payable—Cars, G.M.A.C.	5,880.00
Mobile home—Midland-Guardian	1,656.60
J. Harry Moye—Net worth	414,934.86
Total	487,055.46

Integrated alleges that Moye has overstated his available funds and understated his cost estimates. Both Moye and the Bureau oppose addition of the requested financial issue.

6. In view of Moye's adequate financial showing, the Review Board is of the opinion that Integrated's petition does not warrant the addition of either a funds availability issue or a cost estimates issue.[3] First, Integrated argues that Moye's available funds will be only $84,878.00, rather than the $106,600.00 figure listed. Petitioner reaches this lower figure by reducing Moye's total by $2,025.00 for accounts payable; $10,000.00 for the open note payable to A. V. Kennedy, which, Integrated asserts, may be due during construction or during the first year of operation; $3,325.00, $700.00 and $350.00 for closing costs, commitment and extension fees, respectively; and $10,321.76 for payment of the first year's principal and interest on the $90,000.00 loan. Moye does not contest the deduction of $2,025.00 for accounts payable and we agree with Integrated that this amount should be deducted from Moye's total available funds. However, regarding the Kennedy note of $10,000.00, Moye, in his opposition, has stated that in listing his available liquid resources, he omitted $10,000.00 since he was aware that this note would soon be due, and, in fact, it has recently been paid

[3] We note that, while not requesting a cost estimates issue, as such, Integrated does raise several questions relating to Moye's cost estimates. However, since both Moye and the Bureau have addressed themselves to these questions, the Board will rule on the merits of Integrated's allegations, and will not dismiss them, as Moye requests.

without depleting Moye's available cash. In view of Moye's uncontested statement, we find no basis for subtracting the $10,000.00 from Moye's liquid assets. Next, regarding the commitment and extention fees, we note that, in Moye's commitment letter from the United Federal Savings and Loan Association, Waycross, Georgia, McGregor Mays, Executive Vice President of the Association, states that: "Any commitment fees paid to be refunded upon the closing of a loan under the terms and conditions set out above and within the time specified in this commitment". Consequently, the $700.00 Commitment fee and the $350.00 extension fee will be refunded once the loan is finalized; however, the $3,325.00 fee for closing costs will have to be deducted from Moye's available resources. The first year's payment of principal and interest on the loan also diminishes Moye's available resources; therefore, his net proceeds from the $90,000.00 loan will be $76,354.44 and his total available funds will be $95,929.44.[4]

7. Next, Integrated asserts that Moye has underestimated several of his expenses. First, petitioner argues that Moye's budget for professional fees, in the amount of $2,000.00, is inordinately low, especially in light of Moye's most recent balance sheet where he lists payments and expenses in connection with his application at approximately $6,000.00.[5] This argument is unpersuasive because petitioner has not supplied an affidavit of a person with personal knowledge as to how much the reasonable expenses should be. See Section 1.229(c) of the Commission's Rules; and our prior Memorandum Opinion and Order in this proceeding, FCC 72R–170, 24 RR 2d 735, 736. See also *Howard L. Burris*, 29 FCC 2d 462, 21 RR 2d 1093 (1971); and *Lorain Community Broadcasting Co.*, 5 FCC 2d 810, 8 RR 2d 1141 (1966).[6] Second, in view of the designated staffing issue against Moye [7], and his intent to operate the station 84 hours a week with only three persons, Integrated argues that it is likely Moye will incur additional expenses in order to effectuate his programming proposals. Again, Integrated offers no documentation to support its argument, and, as both Moye and the Bureau point out, a satisfactory resolution of the staffing issue will not necessarily entail the employment of additional personnel or expense.

8. Next, Integrated attacks Moye's estimate of $6,000.00 for acquiring, remodeling and constructing his transmitter and studio buildings. However, we believe that Moye's opposition pleading satisfactorily counters Integrated's contention. Moye explains that he currently owns a structure which was built with the intention of converting it to house his broadcast station; that the 800 square feet building is fully equipped with heating and air conditioning facilities and other fixtures necessary for his proposed station; and that the building can be moved to his transmitter and studio site at a cost of $500.00 where an addition of 480 square feet is planned at a cost of approximately

[4] This figure includes the $76,354.44 plus $19,575 (cash on hand plus cash value of life insurance policy minus $2,025 for current liabilities).

[5] This figure was taken from Moye's balance sheet where, under assets, he lists $5,979.20 for expenses connected with the radio station application. This specific figure is not contested by Moye.

[6] Moreover, in view of Moye's substantial net worth, we see no reason why he could not meet current expenses with out-of-pocket payments. *Cf. Central Westmoreland Broadcasting Company*, 27 FCC 2d 298, 20 RR 2d 1267 (1971).

[7] See note 1, *supra*.

$4,000.00.[8] Finally, based on broadcast industry financial data in the AM–FM Broadcast Financial Data—1970, FCC Memo 78309, released January 6, 1972, Integrated claims that average yearly operating expenses for stations in markets comparable to Waycross, Georgia,[9] are almost $100,000.00, which is substantially greater than Moye's estimated $69,000.00. Integrated illustrates its point by using figures from three broadcast stations located in Dalton, Georgia, whose total operating expenses were $295,026.00 or $98,342.00 per station. However, it is clear that such comparison, without more, is invalid. *Eastern Broadcasting Corp.*, 28 FCC 2d 28, 30, 21 RR 2d 417, 419 (1971). See *Moline Television Corp.* (*WQAD–TV*), 12 FCC 2d 770, 13 RR 2d 77 (1968). Thus, we agree with the Bureau that the Commission is concerned with whether Moye, and not some other broadcaster in a different market, has sufficient funds to construct and operate *his* proposed station. Furthermore, Integrated's average offers no basis for comparison since two of the Dalton stations operate daytime-only and the other is a full-time station. In sum, we conclude that Integrated's arguments concerning Moye's cost estimates are too speculative to warrant an issue.

9. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed March 17, 1972, by Integrated Broadcasting Company, Inc., IS GRANTED to the extent indicated below, and IS DENIED in all respects; and

10. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

To determine whether the 0.5 mv/m contour of the proposed operation of Dowric Broadcasting Company, Inc. will overlap the 0.5 mv/m contour of standard broadcast Station WMNT, Garden City, Georgia in contravention of Section 73.37 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the issue added herein SHALL BE on Dowric Broadcasting Company, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[8] Integrated's reply adds nothing to its claim. It states it is unlikely that the necessary power lines have already been placed in the building and that, if the building can be moved as is, it will not physically be able to support broadcast equipment. However, these arguments still fail to raise a substantial question as to whether Moye's costs will be increased by any significant amount.

[9] Waycross is Moye's proposed city of license.

F.C.C. 72R-219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ERWIN O'CONNER, TRADING AS ERWIN O'CONNER BROADCASTING CO., DAYTON, TENN.	Docket No. 18547 File No. BPH-6408
NORMAN A. THOMAS, DAYTON, TENN.	Docket No. 18548
For Construction Permit	File No. BPH-6479

MEMORANDUM OPINION AND ORDER

(Adopted August 8, 1972; Released August 10, 1972)

BY THE REVIEW BOARD:

1. The Review Board has before it a petition for leave to amend in the above captioned proceeding, filed June 23, 1972, by Erwin O'Conner trading as Erwin O'Conner Broadcasting Company.[1] In his amendment, O'Conner seeks to show an increase in his liquid assets available for construction and operation of his proposed station. The petition is opposed by Thomas who takes the position that this is the fourth in a series of petitions in which O'Conner has undertaken to modify his financial proposal. Thomas notes that the first of these petitions was denied by the Hearing Examiner as being untimely and for failure to show good cause. O'Conner appealed from the Examiner's ruling and the Review Board denied his appeal. The two subsequent petitions were also denied by the Hearing Examiner for essentially the same reasons. Thomas contends that O'Conner has made no better showing in conjunction with the instant pleading. The Broadcast Bureau, in its comments, notes that it has no objection to a record which reflects the current situation as to O'Conner; however if the amendment were granted, the Bureau contends, the matter must be remanded to the Examiner for further hearing to explore unresolved questions as to O'Conner's financial qualifications.

2. The Hearing Examiner's Initial Decision proposing to deny O'Conner's application for failure to establish his financial qualifications (FCC 71D-101), was released January 4, 1972. O'Conner's instant petition, filed June 23, 1972, more than six months after release of the Examiner's Initial Decision is inordinately late and no showing of good cause to justify this late filing has been made. Moreover, the substance of the amendment tendered with the instant petition has already three times been considered and denied by the Hearing Examiner, and its acceptance would necessitate reopening of the record and further hearing, which would be disruptive of the orderly and efficient

[1] The Board also has before it an opposition to O'Conner's petition to amend, filed July 5, 1972 by Norman Thomas, and comments, filed by the Broadcast Bureau, July 5, 1972.

disposition of this case. In view of these circumstances, O'Conner's petition will be denied.

3. Accordingly, IT IS ORDERED, That O'Conner's petition for leave to amend, filed June 23, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-775

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (CHICO, CALIF.)	Docket No. 19330 RM-1621

REPORT AND ORDER

(Adopted August 29, 1972; Released September 1, 1972)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it a Notice of Proposed Rule Making,* adopted October 14, 1971, dealing with the possible assignment of Channel 258 to Chico, California. Comments and reply comments were filed by the proponent, Odyssey Radio, Inc., and by Richardson Broadcasting Company, licensee of Station KPAY(AM), and permittee of Station KPAY-FM, both in Chico. Briefly, Odyssey has argued that a third Class B assignment is needed to provide service to Chico and the surrounding area and in particular to serve the student bodies of several nearby colleges. Odyssey asserts that these matters are sufficient to overcome the reluctance to assign a third FM channel to a community of this size and contends that the assignment could be made without disruption of the FM Table or serious preclusionary impact. Richardson, on the other hand, argues that the channel is not needed and that the preclusionary impact would be substantial indeed.

2. In the Notice we indicated that Chico's population of 19,580 would not normally warrant three assignments. Nevertheless several matters raised in the petition seemed worthy of exploration to see if an exception might be warranted. First, Odyssey had referred to the significant size of the student enrollment at nearby colleges as a factor that it believed required recognition both in terms of the numbers of students as well as their need for an additional service directly attuned to their interests. Odyssey also asserted that Chico was the focal point for a growing valley area and thus would be the logical location for an additional service to an area it said was presently underserved. Comments on the needs for additional service were solicited as were showings on the preclusionary impact the proposed assignment would have on the proposed channel and on the six adjacent channels.

3. In response to the Notice, Odyssey reiterated its view that Chico warranted a third assignment. As before, it emphasized Chico's position as the center of the valley area and the importance of providing a

*36 F.R. 20534.

station that would respond to the needs of the college population in the Chico vicinity. None of the existing broadcasting operations, it insisted, were meeting the needs of the student population and a third FM channel, it argued, could be utilized for this purpose without damage to existing broadcast operations. In terms of preclusionary impact, Odyssey asserted that substitute channels would be available for assignment in areas precluded by the proposed Chico assignment.

4. Richardson opposed the assignment contending that Chico was too small to warrant three assignments. It argued that the history of broadcast operations in the area demonstrated the lack of viability of independent FM stations such as Odyssey would establish. Richardson insisted that abundant services were available and contended that Odyssey erred in adding the student population figures to the Chico total to establish the population to be served. This, it stated, gave a false picture, for the Census Bureau population figures include students as part of the total for the area in which they reside while at school. Richardson also emphasized the considerable preclusionary effect it saw resulting from the proposal and likened this situation to one in which the Commission recently denied a proposal for a third channel in a community of virtually identical size.

5. After review of the showings made in this proceeding, we have concluded that this proposal should be denied. Our reasons for this decision are essentially two-fold. First, Chico (and the area which a station on the proposed channel would serve) already receives a significant number of aural services. Odyssey has failed to establish that another is needed now. While some more remote areas in the valley may be in need of additional service, this fact is of no assistance to Odyssey as they are beyond the coverage area of a Chico operation. In addition, the preclusionary impact would be considerable, and would occur on six of the seven channels involved. While substitute channels would be available for use in certain precluded communities, the fact remains that the net impact would still be considerable. In fact, favorable action on this proposal would inevitably restrict our ability to provide for additional services where they are far more needed. By way of contrast, Chico already benefits from service from two unlimited time AM stations and one (soon to be two) Class B FM services. Nearby Paradise has a daytime-only AM station and a vacant Class A FM channel and Oroville (also in the area) has an unlimited time AM station as well as an unoccupied Class A assignment. Thus, in terms of the community itself and the area a Class B station could serve, the picture is not one of inadequate service. Chico has on the order of 20,000 residents (including college students) and a community of this size is not normally assigned more than two FM channels. Although the percentage of the population represented by college students appears high, this in itself is not a sufficient basis for making the assignment, especially when the overall population figure falls far below the 50,000 normally required to justify a third FM assignment. Nor does any of the other information before us provide a valid basis for diverging from our usual practice. As matters now appear, adequate service is available or to the extent that inadequacies elsewhere in the valley do exist, this proposal would not bring any meaningful im-

provement. Since use of the channel as proposed could have a significant preclusionary effect in areas of greater need, any doubts about the proposal must be resolved in the negative. In sum, the cost of bringing a third FM service would be expected to far exceed its value, and the proposal will be denied.

6. IT IS ORDERED, That the subject proposal IS DENIED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

37 F.C.C. 2d

109-008—72——4

F.C.C. 72-774

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (JACKSONVILLE, N.C.)	Docket No. 19331 RM-1698

REPORT AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it the Notice of Proposed Rule Making* in this proceeding, adopted October 14, 1971. In response to the petition from Brown Broadcasting Company, Inc. ("Brown"), the Commission issued a Notice in which it indicated its intention to explore the possibility of assigning Class C FM Channel 253 to supplement the two existing Class A FM assignments in Jacksonville, North Carolina. Filings in favor of the proposal have been made by Brown and against it by Onslow Broadcasting Corporation ("Onslow"), Marine Broadcasting Corporation ("Marine") and the city of Belhaven, North Carolina, which expressed concern about the possible impact of the proposal on that community's opportunity to obtain its own FM assignment in the future. Marine and Onslow are licensees of AM and FM stations in Jacksonville and Brown is licensee of an AM station there and through this proceeding hopes to obtain an FM authorization as well.

2. In our Notice we indicated that two points which were of particular concern would have to be resolved before favorable action could be taken on the proposal. Thus, we needed to know whether the assignment of a Class C channel would have a deleterious effect on the ability of the current Class A operations to survive and whether it would significantly preclude otherwise possible FM assignments. Although the population of Jacksonville was well below that normally required for the assignment of three FM channels, we noted the presence of nearby Camp Lejeune which we were advised had a population of 57,710. To explore the significance of the military base population, the need for service beyond the area which would be served by a Class A operation and the other, previously mentioned, matters, we decided to adopt the subject notice. Although the material filed by the contending parties is lengthy and involved, the basic issues are readily discernible and not unduly complex.

3. Before considering the original proposal, we turn to the counterproposal involving assignment of a Class A channel offered by Onslow

*36 F.R. 20535.

and rejected by Brown. Although this plan would result in the creation of a new short-spacing for an existing station, it would also permit significant improvement in the quite severe existing short-spacings involved. None of the stations which would be affected by this approach have offered any comments on it. To Onslow, assigning a Class A channel would better comport with the needs of Jacksonville while avoiding the problems which would attend intermixture. Brown sees the plan as being disruptive and rejects the alleged dangers of intermixture as unfounded. Our difficulties with the counter-proposal are not centered on the fact that it would create a new short-spacing, particularly since it would permit a notable net improvement in the current pattern of short-spacing. Thus, in other circumstances, such a plan might well be worthy of consideration. Here, however, the problem is with the assignment of the channel itself, not its secondary consequences. In large measure, the reasoning offered in support of an additional Jacksonville assignment is premised on the service which only a Class C operation would be able to provide. Without these advantages, the question is simply one of duplication—is another Class A channel needed? The answer to this question is no. Jacksonville has a population of only 16,021 and yet is served by two local FM stations and three local AM stations, one of them unlimited time. Although Jacksonville and the surrounding area appear to be growing, it does not appear that a third FM assignment would be required for quite some time according to our policy of not assigning three channels to communities under 50,000 population. Brown urges us to take into account the population residing on the nearby Camp Lejeune military reservation, and so we did in adopting the Notice, but our intent was not to treat the Camp as part of Jacksonville, for it is not and we do not so regard it. It is a separate community, in fact a much larger one than Jacksonville. In addition, our understanding that the Camp population was nearly 60,000 appears to have been incorrect. Rather, the population appears to be in the neighborhood of 35,000. While the size of the Camp population is not without significance, it is both smaller than we thought and like other military reservations, fluctuates. Even assuming no reduction in the current figure and giving it appropriate weight, we do not believe that the need for a sixth aural service at Jacksonville has been demonstrated. Establishing the degree to which the Jacksonville stations are attentive to the needs of the Camp population is not an allocations matter. Rather, the question is whether, taking into account the population of the base and considering other appropriate criteria, another assignment is warranted. Neither Jacksonville, nor any area which a Class A operation would serve could be considered as underserved. While the counterproposal avoids the question of intermixture, this is no reason to make an assignment for which there is no demonstrated need, and it will be denied.

4. The Class C approach, while offering several advantages, suffers from real disadvantages as well, some the unavoidable consequence of its advantages. The question is how the balance is to be drawn. Thus, the Class C approach would provide for much wider coverage, including an area said to lack any current FM service, and on the other side, is subject to possible infirmities on the grounds of inter-

mixture and preclusionary effect. That a Class C operation would reach more listeners is beyond doubt, but the extent of the need for the service and consequences of steps necessary to provide it, are matters of great dispute. As we had occasion to observe in the Notice, there would be no public interest benefit if the making of a Class C assignment were to cause the demise of the service provided by the existing Class A operations. The existing stations have argued that the market would not support a new Class C operation without destroying their chance for survival. They contend that they could not compete with a station able to serve so much larger an area and population, and they assert that their FM stations could not continue their essentially non-duplicated operations. Brown points to growth in the area and argues that there is more advertising potential that has yet to be tapped. Needless to say, the assignment of the channel would not foreclose the making of a *Carroll* showing in connection with any application that was filed, and we did not have in mind precisely that sort of inquiry. In theory, an additional assignment of the same class could have *Carroll* implications. The question of intermixture and its possibly disruptive effects is a different matter, one which must be resolved before favorable action could be taken. We do not find in Brown's showing a basis for resolving our concern. Previously, notwithstanding our policy against intermixing classes of channels, we have added one or more A channels to communities that previously had only Class B or Class C assignments, but such a step has none of the potential for harm to existing service that arises here. There, the worst that could happen from the inequality is that the Class A operation would falter in competition, but in reliance on the petitioner's assurances and in order to provide the additional service thought to be needed, we have made such assignments. Whether the choice is a wise one or not, the fact is, that the risk is not one taken by the public. Here, quite the reverse is true. Only under extraordinary conditions could adding a Class C channel be justified. While we were willing to explore the matter, we indicated that a showing would have to be made to resolve our concern. Brown's showing does not so much address intermixture as it does the economics of a third assignment as such. Special problems are raised by intermixture and Brown has not resolved them or shown that compelling reasons justify the assignment in spite of the problems and risks involved.

5. Brown rests part of its argument in favor of making a Class C assignment on the absence of any FM service in part of the area a Class C station would reach. However, in order to rely on such an absence of service, certain documentation is required. Thus, a proponent is obliged to examine unoccupied channels in the Table and presume their being operated with reasonable facilities and to consider pertinent AM services—all this in addition to considering the signals of operating FM stations in the area. Brown's showing does not meet this test, and beyond doubt there is no area unserved during day-time hours and the same appears to be true at night. Brown was obliged to show a lack of service before it could rely on the assertion. Having failed to do so, the population beyond the reach of a Class A station but within that of a Class C must be examined strictly in terms of its size and presumed need for additional service, without special weight

being attached to the providing of a first service. While, as might be expected, a Class C operation would serve a larger number of people than a Class A, the population appears to have adequate service already. The area reachable by a Class C and not a Class A operation is some distance from Jacksonville and the very fact that the total population is greater is cause for more concern in terms of intermixture. Thus, there is little to be gained and much possibly to be lost by making the assignment, even without considering its preclusionary impact. That impact, considerable as it is, necessitates denial of the proposal even were we to be otherwise favorably disposed toward it. Assignment of the channel—clearly a matter of marginal utility at best—would lead to significant areas of preclusion. Even if other channels could be substituted for the ones precluded, our flexibility in responding to the need for additional service at various locations in the general area would be restricted. In sum, we are unable to conclude that Jacksonville requires a third FM channel, particularly a Class C channel. Although we are denying the proposal, the possibility that a third FM service might be needed some time in the future cannot be discounted. However, absent considerable population growth and a showing markedly more persuasive than the one now before us, we would not be disposed to consider making a Class C assignment at any time in the future.

6. Therefore, IT IS ORDERED, That the subject proposal to assign Channel 253 to Jacksonville, North Carolina and the counterproposal to assign Channel 280A to Jacksonville ARE DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-772

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (HATTIESBURG, MISS.; PARKERSBURG, W. VA.; TALLAHASSEE, FLA.)	Docket No. 19413 RM-1758 RM-1767 RM-1772

FIRST REPORT AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission here considers the Notice of Proposed Rule Making in the above proceeding, adopted January 26, 1972 (FCC 72-83; 37 F.R. 2790), proposing amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules) as concerns the assignment of an additional channel to Hattiesburg, Mississippi, and Parkersburg, West Virginia. As to Tallahassee, Florida, we are this day adopting a Further Notice of Proposed Rule Making (FCC 72-773).

2. The Notice pointed out that the Commission had reservations about each proposal. As to all three, we raised the question of intermixing classes of FM assignments. As to two proposals here disposed of, note was made that allocating another channel to the named city would be in excess of population criteria: see the Further Notice of Proposed Rule Making in Docket No. 14185, adopted July 25, 1962 (FCC 62-867), and incorporated by reference in par. 25 of the Third Report, Memorandum Opinion and Order, adopted July 23, 1963, 23 R.R. 1859, 1871.

3. *Hattiesburg, Mississippi (RM-1758).* Triple X Broadcasting Company, Inc. (Triple X), licensee of daytime-only AM station WXXX, Hattiesburg, Mississippi [1], had petitioned for the assignment of Channel 221A as a third FM channel for that community. That assignment may be made without affecting any FM assignment elsewhere. Hattiesburg, population 38,277, is the seat of Forrest County (57,849). It presently has seven aural facilities—two Class IV and three daytime-only AM stations and two Class C FM stations (the latter are operated in conjunction with the full-time AM stations).

4. Triple X, both in its petition and comments, relies on the fact that Hattiesburg has a burgeoning economy, it is a university community (approximately 9,000 students at the University of Southern Missis-

[1] The stockholders of Triple X also have controlling interest in Stations WSWG and WSWG-FM, Greenwood, Mississippi, and WHHM, Henderson, Tennessee, but this is of no significance under the Commission's Rules.

sippi and William Carrey College), and that no local station provides a fulltime service, which Triple X alleges it would provide if the channel were assigned and it becomes the successful applicant (a contemporary program format is intended).

5. From the technical viewpoint, assignment of Channel 221A would have a preclusionary effect in limited areas on the channel itself and on educational FM Channels 218, 219, and 220. The preclusion on Channel 221A is at Waynesboro, Mississippi, population 4,368, and Petal, population 6,986; Waynesboro is served by FM Station WABO, Channel 288A, assigned to that community; Petal is an unincorporated community located northeast of and adjacent to Hattiesburg,[2] and its population is included in the idea of "metro-area" population in excess of 50,000 which Triple X relies on to show compliance with population criteria (see below). As the Notice stated, the impact on the three adjacent educational FM channels is not great, since there appear to be a large number of assignment possibilities on other educational FM channels for any foreseeable needs in the area; further, the University of Southern Mississippi's construction permit (CP) for Channel 216 (Station WMSU) would limit our concern in this respect to only Channel 220. The Notice also pointed out that the possibility of second harmonic interference to Channel 6 from educational FM stations is not likely to be a problem.

6. Because of our action in Docket No. 18883 denying assignment of Channel 269A to Hattiesburg (27 FCC 2d 844, 847–8 (1971), Triple X endeavors to distinguish this proposal from the one there. In Docket No. 18883,[3] we denied assignment of Channel 269A to Hattiesburg because of population criteria and that proposed assignment would have precluded the channel assignment to Collins, population 1,934. We there also raised the question of intermixture. As to population, Triple X now argues that that of the Hattiesburg "metro-area" including student population in excess of 7,000 and that of Petal is in excess of 50,000, thus, permitting allocation of an additional channel to Hattiesburg under our population criteria. We need not reach that question here, for there is another consideration for assigning Channel 221A to Hattiesburg.

7. As already noted, preclusion on the channel itself is minimal, and the impact on educational Channel 220 is minor. Further, and more importantly, except for Petal, the channel may not be assigned elsewhere in the vicinity without substantial changes in the FM Table of Assignments. We do not feel that a separate allocation should be made to Petal, for it is an unincorporated community which is a suburb of Hattiesburg; and, as already noted, assignment to Hattiesburg still would allow someone to apply for the channel at Petal (fn. 2). It appears that unless the channel is allocated to Hattiesburg in fact it may not be used elsewhere. In these circumstances, there is no reason why the channel should not be assigned to Hattiesburg on the basis of demand, without consideration of population criteria which is only

[2] If a channel were assigned to Hattiesburg, it could be used at Petal under the ten mile rule (Section 73.203(b) of the Rules).

[3] Deep South Radio, Inc., licensee of daytime Station WBKH, the unsuccessful petitioner in Docket No. 18883 filed supporting comments here. It stated that it intends to file for the channel if assigned in this proceeding.

one of many considerations to be weighed in arriving at a fair and equitable distribution of FM allocations under Section 307(b) of the Communications Act, as amended. Accordingly, on due consideration of all the interests involved, we have decided to allocate Channel 221A to Hattiesburg, Mississippi.

8. *Parkersburg, West Virginia (RM–1767).* The Notice also put out for consideration the proposal of Electrocom, Inc. (Electrocom) to assign Channel 236 to Parkersburg, West Virginia. This assignment could be made without affecting FM assignments elsewhere. Parkersburg, population 44,208, is the seat of Wood County, population 86,818. Parkersburg is the central city of the Parkersburg-Marietta (Ohio) Standard Metropolitan Statistical Area (SMSA), population 143,978. Marietta, population 16,861, is the seat of Washington County, 57,160. Other sizeable communities in the area are Vienna, population 11,549, also in Wood County, about 8 miles from Parkersburg, and Belpre, Ohio, population 7,189, just across the river from Parkersburg. Those commenting on the proceeding are Franklin Broadcasting Co., Inc. (Franklin), licensee of Stations WCEF and WCEF–FM, Parkersburg; Broadcasting Services, Inc. (Broadcasting Services), licensee of Station WTAP and WTAP–FM, Parkersburg; and Major Minor Corporation (Major Minor), licensee of Stations WMOA and WMOA–FM, Marietta, Ohio.

9. One of Electrocom's contentions in its petition was that "greater" Parkersburg has enjoyed a tremendous industrial growth in the past few years and that informed sources estimate the county population will be 110,000 by 1980. These contentions were made prior to the establishment of the Parkersburg-Marietta SMSA in December 1971. The Notice pointed out that there was substantial preclusion on Channels 236 and 237 over wide areas. However, as to the former, we noted that the communities concerned had assignments and do not warrant additional channels, while as to Channel 237A there would be several without FM assignments, for example, Ravenswood and Point Pleasant, West Virginia, populations 4,240 and 6,122, and a number of smaller communities. The Notice also raised the question as to whether an additional assignment should be made to Parkersburg under population criteria and whether intermixture of Channel 236 with the Class A Stations WCEF–FM and WTAP–FM would be appropriate. The Notice also specifically requested that additional information be furnished by Electrocom as to areas of populations that are presently unserved (no aural service) or underserved (one aural service) within the 1 mv/m contour of the petitioner's proposed FM station. In this respect, it was noted that the showing should be made in accord with the *Roanoke Rapids-Goldsboro* case, 9 FCC 2d 672 (1967).

10. Electrocom in its comments urges that the population criteria are not apt and intermixture is warranted primarily because the needs and interests of the area are not being adequately served by the Parkersburg's Stations WTAP–FM and WCEF–FM. With respect to population, Electrocom alleged that that of the city fails to disclose the actual population, which it urges is 82,540, that is, in addition to that of Parkersburg, itself, Vienna (11,549); Williamstown (2,247); Belpre (7,189); and Marietta (16,861). Electrocom here relies on the fact that the Parkersburg area was designated as an SMSA as of December 13,

1971. It also states that because of local ordinances, Parkersburg has been unable to incorporate additional property into the city limits; in these circumstances, it urges that the SMSA population should be controlling in order to avoid use of incomplete data without substantive meaning due to the restrictions of local ordinances. Electrocom lists the various statistics showing economic growth and development, that is, the marketing hub of an 11-county area with 20,000 farms and an agriculture income of about $20 million. The Commission is also asked to look on the various growth projections and other facts which will significantly alter the character of Parkersburg, that is, urban renewal project and the construction of Grand Central Mall between Parkersburg and Vienna (because of the rugged terrain, it is alleged that the Mall cannot be served by the Parkersburg Class A FM stations). Finally, Electrocom states that a wide coverage channel is particularly warranted because of the substantial size of Parkersburg and the rugged terrain of the sparsely populated surrounding areas. In connection with the showing of unserved and underserved areas, Electrocom states that there would be service to an unserved area of 602 square miles with a population of 18,369 and an underserved area of 787 square miles with a population of 16,333. Electrocom also expresses the view that these areas may be greater considering terrain.

11. Underlying the comments of Franklin, Broadcasting Services, and Major Minor is the thesis that there would be a serious economic consequence to the broadcast services provided by each. Franklin also sharply disagrees with Electrocom as to the economic growth of the area. It also contends that any inadequacies of local radio service are overcome by Durfee's TV Cable Co., which provides 12 FM stations (including the three local ones) to its 16,000 subscribers. Broadcasting Services feels that the assignment of a Class B channel to Parkersburg, and a station on it, would have a chilling effect on its efforts to program its AM and FM stations separately for a greater time daily. Indeed, Broadcasting Services concludes that a station on a Class B channel would make the financial success of WTAP–FM questionable, and the net effect would be less rather than more FM service to residents of the area. Major Minor Corporation also speaks of the "chilling effect" on its current plans to add stereophonic programming and longer hours of broadcast service to WMOA–FM's format. It views the proposed Class B assignment as "a mortal economic blow".

12. Franklin also takes the position that Electrocom has not fulfilled its burden of meeting the issues raised by the Commission in the Notice. In this respect, it is stated that Electrocom has made no attempt to show what other channels could be assigned to the communities in the area precluded by use of Channel 236. With respect to population criteria, this party attacks Electrocom's reliance on the use of neighboring communities to arrive at the requisite population figure without considering the existing radio services, for example, Marietta's four stations—WBRJ (daytime only), WMOA, WMOA–FM, and WCMO (educational FM). It also attacks Electrocom's engineering study; here reliance is placed on our recent decision in the *Oak Ridge* case, 32 FCC 2d 937, 942, where we stated that a determination of unserved and underserved areas should include AM nighttime service. Franklin feels that Electrocom has made no showing either to justify mixing the

classes of stations or adding another channel to a market. Broadcasting Services makes similar observations in its reply comments. It also attacks Electrocom's growth projections as conclusionary in nature and lacking sufficient detail to provide the Commission with factual information needed to reach a decision. This party urges that Electrocom's *Roanoke Rapids-Goldsboro* showing, should have restricted itself to a showing of 30 kw and 300 feet a.a.t. rather than a 50 kw ERP and 500 feet antenna height, since Electrocom has made no commitment that it would operate at the higher height and power. Finally, this party contends that Electrocom's assumption as to service to unserved and underserved areas based on rugged terrain would equally restrict signal penetration from its proposed Class B station.

13. With respect to economic injury, it suffices to say that the economic well-being of broadcasters is only of concern as it affects the public interest rather than that of individual stations. *FCC* v. *Sanders Bros.*, 309 U.S. 470 (1940). While Franklin, Broadcasting Services, and Major Minor have attempted to guise their economic contentions in terms of public interest, it seems fairly clear that each one's true concern is only of private interest. In the circumstances, we may disregard the economic injury arguments. See and compare *In the Matter of Oak Ridge, et al.*, 32 FCC 2d 937, 940 (1972).

14. While our Notice raised as an issue that of intermixture of classes of FM channels, it should be noted that intermixture as such is not something which is to be assiduously avoided in any circumstance. As we said in the *Oak Ridge* case (32 FCC 2d at 941):

> * * * the Commission tried to adhere to such a concept to the extent possible, but now that FM allocations are becoming more difficult in some areas, to continue to do so would be a vain effort aimed at equality and parity of service inconsistent with public interest, convenience, and necessity considerations as required by the Communications Act of 1934, as amended * * *

There are a number of communities in West Virginia with intermixed assignments: Bluefield; Clarksburg; Fairmont; and Morgantown. Indeed, the assignment of Channel 250 to Fairmont was made because of "rugged terrain" a factor of substantial importance considering the geography of the area including that in and around Parkersburg.[4]

15. As in the *Hattiesburg* case, there seem to be compelling reasons why the population criteria should not be applied. Just as with the intermixture policy, this is not a mandate which must be blindly followed, if a different result is more compatible with the overall public interest, convenience, and necessity objectives of the Communications Act of 1934, as amended. Here, we find such a consideration because quite obviously a Class A channel cannot provide adequate service because of terrain. While it can be argued that the overall public interest would be better served by assigning Channel 236 to one of the many communities in the preclusion areas, to make a Class B assignment to one of them does not comport with overall FM allocation policy. While we have made Class B assignments to smaller communities on other occasions, we did so on the basis of a showing that someone would promptly apply for the channel and build a station, if the assignment

[4] It should be noted that Franklin and Broadcasting Services could apply for the Class B channel.

were made. Here, the only proposal is that of Electrocom.[5] In sum, considering the contentions of the parties and the overall public interest, it is the judgment of the Commission that Channel 236 should be assigned to Parkersburg. We agree with Broadcasting Services that the terrain is such that Electrocom's estimates of unserved and underserved area may be inexact.[6] As concerns the contention of Franklin that based on the *Oak Ridge* case AM nighttime service should be included, it seems fairly clear that on the basis of AM service in the area there would be no substantial difference in unserved and underserved areas from the showing as to FM service, and, in this respect, quite clearly these areas are substantial even assuming that Electrocom's computation may not be exact. On the other hand, to the extent that our determination here is based on Electrocom's showing based on 50 kw power and 500 feet, the assignment of Channel 236 to Parkersburg will be based on use of a facility with the equivalent of that power and height.

16. Accordingly, IT IS ORDERED, That effective October 17, 1972, the FM Table of Assignments (Section 73.202(b)) IS AMENDED as concerns the cities listed below, as follows:

City	*Channel No.*
Hattiesburg, Miss	221A, 279, 283.
Parkersburg, W. Va.[1]	236, 257A, 276A.

[1] 50 kw ERP and 500 foot antenna a.a.t. or equivalent.

17. Authority for this action is found in Sections 4(i), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[5] Under Section 73.203(b), one may apply for the channel if within 15 miles of Parkersburg. Thus, for example, someone could apply for it at Vienna or Belpre.

[6] The determination should have been made on a terrain limited basis; see and compare Notice of Proposed Rule Making in Docket No. 19540, adopted July 6, 1972 (FCC 72-603).

NOTE.—Rules changes herein will be covered by T.S.III(72)-1.

F.C.C. 72R-234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
HARVIT BROADCASTING CORP., WILLIAMSON, W. VA.	Docket No. 18456 File No. BPH-6075
THREE STATES BROADCASTING CO., INC., MATEWAN, W. VA.	Docket No. 18457 File No. BPH-6157
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 21, 1972; Released August 23, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. This proceeding, involving the mutually exclusive applications of Harvit Broadcasting Corporation (Harvit) and Three States Broadcasting Company, Inc. (Three States) for construction permits for new FM broadcast stations at Williamson and Matewan, West Virginia, respectively, was designated for hearing by Commission Order, FCC 69-180, 16 FCC 2d 806. Subsequently, in response to a request by Harvit, the Review Board, by Memorandum Opinion and Order, released September 29, 1971 (31 FCC 2d 876, 22 RR 2d 1062), added several issues against Three States relating to its operation of standard broadcast Station WHJC at Matewan.[1] Presently before the Board is a petition to enlarge issues, filed March 27, 1972, by Harvit [2] seeking an inquiry into the billing practices of Three States.

2. In support of its request, Harvit alleges that Three States has billed one of its advertising accounts, B & L Furniture Company (B & L), for more spot announcements than in fact were broadcast during August, 1970–February, 1971 and June–October, 1971 (excluding October, 1970, in which there were two commercial excesses). Harvit also contends that Three States defrauded B & L when it cut B & L's spot announcements from 30 seconds to 15 seconds in September, 1971, and thereafter continued to bill B & L as if no change had occurred. Attached to Harvit's petition is the affidavit of B & L's advertising manager, Charles S. West, asserting the factual allegations upon which Harvit relies. West sub-

[1] One of these issues was modified by the Review Board, by Memorandum Opinion and Order, released April 21, 1972 (34 FCC 2d 586, 24 RR 2d 160).

[2] Also before the Board are the following related pleadings: (a) supplement to petition to enlarge issues, filed April 3, 1972, by Harvit; (b) opposition, filed April 11, 1972, by Three States; (c) comment, filed April 18, 1972, by the Broadcast Bureau; (d) reply, filed April 21, 1972, by Harvit; (e) petition for leave to file, with supplement to petition to enlarge attached, filed May 19, 1972, by Harvit; (f) opposition to (e), filed June 1, 1972, by Three States; and (g) reply to (f), filed June 13, 1972, by Harvit. In our opinion, Harvit has not shown good cause for the filing of its second supplement almost two months after its original petition. The information contained in the supplement was available to Harvit at the time it filed its petition on March 27, 1972. Since the supplement is otherwise unauthorized by the Commission's Rules (see Section 1.294 of the Commission's Rules), the petition for leave to file will be denied and the supplement attached thereto will not be considered.

mits that, by letter dated August 27, 1971,[3] Three States notified B & L that it intended to reduce B & L's spot announcements from 30 seconds to 15 seconds and yet continue to charge the same rate as previously arranged (*i.e.*, 50 cents per spot). By letter dated September 1, 1971,[4] West continues, B & L rejected this proposal as a possible violation of the "wage-price freeze" and informed Three States that it expected to be billed at the old rate as long as the "freeze" remained in effect. Thereafter, on March 6, 1972, West claims that he learned that WHJC was actually running only 15-second commercial spots and had been doing so since sometime in September, 1971. When West discussed the situation with George Warren, general manager of WHJC, Warren first claimed that the spots were actually 20 seconds in length. He later said the announcements were 15 seconds long and had been changed either November 13th or November 14th, 1971, when the "price freeze" ended. Warren claimed that the change was made in accordance with WHJC's August 27, 1971, letter to B & L. West requested a rebate from Three States, which Warren refused. Upon further investigation of WHJC's program logs, West states that he discovered that during August, 1970–October, 1971 (excluding March–May 1971), WHJC failed to broadcast 93 spot announcements bought and paid for by B & L. In conclusion, Harvit contends that B & L was defrauded because it was never notified of the above circumstances and therefore requests an issue to inquire into Three States' billing practices.

3. In its opposition, Three States contends that Harvit's petition is "tenuous and contains no basis for enlarging the issues". In an affidavit attached to the opposition pleading, Carol Warren, traffic manager at Station WHJC, states that upon reviewing the station logs for August, 1970–October, 1971, inclusive, she discovered that there was a shortage of 58 spot announcements totaling $29 in receipts, $23 for which restitution was made in March, 1972 and $6 which will be credited on April's bill to B & L; that she did not intend to defraud B & L and that the errors made were inadvertent clerical mistakes; and that, rather than canceling advertising on WHJC, B & L has requested additional spots. In another affidavit attached to the opposition, George Warren submits that B & L's advertising rate was below not only the rate card, but also below what other advertisers were paying; that the effective rate increase announced to B & L in its August 27, 1971 letter was necessary to bring B & L's rates in line with WHJC's other customers; and that Three States does not believe there was a violation of the "price freeze". Three States argues that since there was no fraud involved and since B & L seems content with the restitution made (as evidenced by its increased advertising), the petition should be denied in its entirety.[5]

4. The Broadcast Bureau is of the opinion that there should be an issue added regarding Three States' billing practices; however, the

[3] A copy of the letter is attached to Harvit's petition.
[4] A copy of this letter is also attached to the petition.
[5] Three States also argues that the Harvit petition is "an improper attempt to use discovery for enlargement of issues." The Board has recently held, however, that, although "fishing expeditions" are not allowed, facts first revealed in proper discovery may be used as a basis for petitioning to enlarge issues. See *Star Stations of Indiana, Inc.*, 34 FCC 2d 632, 633 n. 4, 24 RR 2d 165, 167 n. 4 (1972); *Folkways Broadcasting Co., Inc.*, 33 FCC 2d 813, 816 n. 16, 23 RR 2d 944, 948–9 n. 16 (1972).

Bureau does not believe that it has been shown that affirmative fraud was committed against B & L. In supporting an inquiry into Three States' overbilling, the Bureau points out the repetitious nature of the practice and raises the question of whether Three States has exercised the requisite diligence contemplated by Section 73.1205 of the Commission's Rules.[6] However, the Bureau does not believe that intent to deceive, or *scienter* (an essential element of fraud), was present. According to the Bureau, B & L was notified by WHJC of its intention to change WHJC's billing procedure with respect to B & L and although there was a dispute between the parties, the Bureau submits that this does not constitute intent to deceive sufficient to support the addition of an issue based on fraud. Therefore, the Bureau recommends the addition of an issue restricted to overbilling.

5. In reply, Harvit contends that Three States' opposition admits overbilling between August, 1970 and October, 1971 (although the amount is in dispute). Petitioner argues that such admission indicates the possibility of other fraudulent billings as far back as 1966 when B & L first started advertising with WHJC; and that it is clear that there has been a pattern of overbilling in violation of the Commission's Rules. Regarding its allegations of fraud, Harvit submits that affirmative fraud has been shown and that it has not been denied by Three States; that length of commercials is an important element of the price charged;[7] that the misrepresentation of not informing B & L of the change constituted fraudulent billing just as much as if it were written on the invoices; and that intent to defraud B & L existed in trying to retain one of WHJC's largest advertising accounts. Harvit also attaches the affidavit of Edward Lovitch, assistant manager of B & L, indicating that B & L is now canceling its advertising on WHJC. Thus, Harvit insists that, by not keeping B & L fully informed when a dispute knowingly existed, Three States affirmatively defrauded B & L.

6. The Review Board will add an issue to inquire into Three States' alleged practice of overbilling. It appears from the pleadings that, for a period of at least 15 months, Three States repeatedly overbilled one of its major advertising accounts, although the exact amount involved is in dispute. In its Memorandum Opinion and Order amending what is now Section 73.1205 of the Rules,[8] the Commission stated that: ". . . [O]utright false billing, the knowing rendition of any bill or other document which misrepresents the number of announcements run, their character, their length, or the date and time of their broadcast [,w]hile less common than double billing . . . are certainly

[6] Section 73.1205, in pertinent part, reads as follows:

"No licensee of a standard, FM, or television broadcast station shall knowingly issue to any local . . . advertiser . . . any bill, invoice, affidavit or other document which contains false information . . . or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee."

[7] In support of this contention, Harvit cites the Commission's Public Notice on *Fraudulent Billing Practices*, 35 FR 7906, 23 FCC 2d 303 (1970):

9. A licensee knowingly issues a bill or invoice to a local or national advertiser which shows broadcast of commercial announcements one minute in length, whereas in fact some of the announcements were only 30 seconds in length.

INTERPRETATION: This is fraudulent billing, since it misrepresents the length of the commercials, a highly important element of the price charged for them. [35 FR at 7907, 23 FCC 2d at 306.]

[8] See note 6, *supra*.

no less fraudulent and contrary to the public interest . . . . Any such misrepresentation certainly reflects adversely on the qualifications of a licensee . . . . "*Fraudulent Billing Practices*, 23 FCC 2d 70, 72, 71, 19 RR 2d 1506, 1508–9, 1508 (1970). In light of the repetitious nature of the alleged overbilling and the apparent lack of reasonable diligence on the part of Three States,[9] we are of the opinion that WHJC's billing practices raise questions of serious misconduct warranting inquiry at the hearing. *Faulkner Radio, Inc.*, 15 FCC 2d 780, 786, 15 RR 2d 285, 292 (1968). *Cf. Star Stations of Indiana, Inc.*, 19 FCC 2d 991, 17 RR 2d 491 (1969). The Board does not believe, however, that Harvit has shown that Three States affirmatively defrauded B & L when it cut the time and length of B & L's commercials. Fraud is "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false misrepresentation of a matter of fact, whether by words or by conduct . . ., or by concealment of that which should have been disclosed, which deceives and is intended to deceive . . . ."[10] It appears that George Warren, general manager of WHJC, notified B & L of its intention to effectuate a rate increase for B & L's account. While B & L rejected this charge as a violation of the "price freeze", it knew that Three States wanted to increase B & L's advertising rate and that as soon as the "price freeze" was over it would attempt to do so. It appears then that a contractual dispute existed. However, since Three States has never in the past issued bills to B & L indicating the time-length of its spot announcements, there is no reason to believe that its failure to do so after it reduced the time-length of B & L's spots was an attempt to defraud B & L. Therefore, the issue added by the Board will be limited to an inquiry into incidents of overbilling by Three States and will not include the question of fraud.[11]

7. Accordingly, IT IS ORDERED, That the petition for leave to file, filed May 19, 1972, by Harvit Broadcasting Corporation, IS DENIED, and the supplement attached thereto IS DISMISSED; and

8. IT IS FURTHER ORDERED, That the petition to enlarge issues filed March 27, 1972, by Harvit Broadcasting Corporation, IS GRANTED to the extent indicated herein and IS DENIED in all other respects; and that the issues in this proceeding ARE ENLARGED by the addition of the following issue:

To determine whether Three States Broadcasting Company, Inc. has engaged in any billing practices violative of Section 73.1205 of the Commission's Rules, and if so, what effect, if any, its conduct has upon its basic and/or comparative qualifications to be a Commission licensee.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issue added herein SHALL BE on Harvit Broadcasting Corporation and the burden of proof under such issue SHALL BE on Three States Broadcasting Company, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[9] See Section 73.1205 of the Commission's Rules.
[10] Black's Law Dictionary 788 (4th Ed. 1951).
[11] *Cf. Kittyhawk Broadcasting Corp.*, 8 FCC 2d 342, 344, 10 RR 2d 189, 193 (1967).

F.C.C. 72R-199

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CHARLES W. HOLT, TALLAHASSEE, FLA.	Docket No. 19445 File No. BP-18189
TALQUIN BROADCASTING CO., QUINCY, FLA.	Docket No. 19446 File No. BP-18464
B.F.J. TIMM, TALLAHASSEE, FLA.	Docket No. 19447
For Construction Permits	File No. BP-18487

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released July 28, 1972)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING; BOARD MEMBER KESSLER CONCURRING.

1. By Commission Order, FCC 72-161, released February 24, 1972, the above-captioned mutually exclusive applications were designated for consolidated hearing on several issues, including Issue 2, which is a *Suburban* issue against Talquin Broadcasting Company (Talquin).[1] The Commission stated that it was designating a *Suburban* issue against Talquin because it had not identified the anticipated time segment, duration, and frequency of the programs it intends to broadcast in response to ascertained community needs. Presently before the Review Board is a motion for deletion or modification of Issue 2 (the *Suburban* issue), filed March 16, 1972, by Talquin.[2]

2. In brief, Talquin requests the Board to delete the *Suburban* issue against it or to modify the issue so that it would inquire only into those matters specifically mentioned in the designation Order. In support of its motion, Talquin contends that, in paragraph 3 of the designation Order, the Commission specified what was deficient in its community survey;[3] that prior to designation, on October 28, 1971, Talquin had amended its application to correct these deficiencies;[4] that the Commission erroneously concluded that Talquin had not met each requirement of the *Primer*, with the possible exception of "anticipated time segment";[5] that the "anticipated time segment" require-

[1] Issue 2 reads as follows:
"To determine the efforts made by . . . Talquin . . . to ascertain the community needs and interests of the areas to be served and the means by which the applicant proposes to meet those needs and interests."

[2] Also before the Review Board are the following related pleadings: (a) opposition, filed March 29, 1972, by the Broadcast Bureau; and (b) reply, filed April 10, 1972, by Talquin.

[3] See paragraph 1, *supra*.

[4] A copy of the amendment is attached to Talquin's motion.

[5] The pertinent requirement of the *Primer* is as follows:
. . . The applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it.
Primer on Ascertainment of Community Problems, 27 FCC 2d 650, 686, 21 RR 2d 1507, 1547 (Question 29) (1971).

ment is of debatable relevance and questionable value to the Commission; and, therefore, that the applicant has substantially complied with all of the significant requirements of the *Primer*, thereby warranting deletion of the issue. In the alternative, Talquin argues that, if the Board does not delete the issue, it must be modified; that unless modified to inquire into only "anticipated time segments", the "boiler-plate" *Suburban* issue, as it now stands, violates Section 309(e) of the Communications Act of 1934, as amended, which requires the Commission, upon designating applications for hearing, to specify ". . . with particularity the matters and things in issue but not including issues or requirements phrased generally"; and that such modification would, rather than expanding and elongating the hearing into an area which the Commission has already found adequate, limit the scope of inquiry, confusion, and controversy (such as the Commission has already done with financial issues), thereby following sound administrative procedure and common sense.

3. The Broadcast Bureau opposes Talquin's request to delete the *Suburban* issue. The Bureau submits that Talquin acknowledges that it did not identify the "anticipated time segments" of its proposed programs in its application. Therefore, the Bureau reasons, Talquin did not fulfill the Commission's *Primer* requirements and purposes (*i.e.*, showing the relationship between broadcast matter and problems). The Bureau also contends that Talquin is arguing policy rather than demonstrating any new factual circumstances arising since designation as required by long-standing Commission policy. Thus, in reference to deletion, the Bureau is of the opinion that Talquin has not made the required persuasive showing. The Bureau also opposes modification of the *Suburban* issue because it believes that the Commission has specified the matters in issue with particularity; and the Bureau states that it intends to address itself to these matters only and not to expand the scope of inquiry. Lastly, the Bureau believes that modification of the issue ". . . would render a hearing on the issue meaningless, since it would eliminate the essential question to be resolved—whether Talquin has properly ascertain[ed] community problems and proposed programming to meet those problems."

4. In reply, Talquin submits that if the Broadcast Bureau were the only other party to this proceeding Talquin would be satisfied by the Bureau's comments. However, since there are two other applicants, and since the Bureau, in essence, supports the pending motion, Talquin contends that, while deletion may not be warranted, modification is. In response to the Bureau's objection that modification would render the issue meaningless, Talquin suggests rewording the issue to include a conclusory question.[6] Talquin stresses that, unless the issue is modified, the hearing will be expanded into unnecessary and unproductive areas.

5. The Review Board will deny Talquin's motion. It is well established that the Review Board will not delete issues designated by the

[6] In effect, Talquin's new issue would read as follows:

"To determine the anticipated time segments of programs to be carried by Talquin Broadcasting Company to meet community needs and interests, and to determine, *in light thereof*, whether the efforts made by Talquin Broadcasting Company to ascertain the community needs and interests of the areas to be served and the means by which the applicant proposes to meet their needs and interests are adequate."

109-008—72——5

Commission absent a compelling showing of unusual circumstances. See, *e.g.*, *Jacksonville Broadcasting Company*, 31 FCC 2d 751, 22 RR 2d 1046 (1971); "*What the Bible Says, Inc.*," 11 FCC 2d 620, 12 RR 2d 235 (1968). There is no such showing in this case. In particular, Talquin has made no new factual allegations showing changed conditions since designation that warrant deletion of the *Suburban* issue. While Talquin contends that its pre-designation amendment of October 28, 1971 satisfied the Commission's objections to its community survey as set forth in the Commission's letter of September 26, 1971, Talquin admits not having included "anticipated time segments" in its amendment. Nor does Talquin contend that the Commission did not consider all of the facts in its designation Order, but merely that the Commission erred in its analysis. Despite these contentions, however, it is clear that Talquin's amendment did not cure the noted deficiencies in its community survey, that no new facts have been presented which would eliminate the need for a hearing, and that there are other issues to be tried. Therefore, deletion of the *Suburban* issue is not warranted. *Jacksonville Broadcasting Company, supra; Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 RR 2d 140 (1965).

6. Talquin's request for modification is based, in part, on its interpretation of Section 309(e) of the Communications Act. While petitioner does not allege that it lacks notice as to what is in issue, it complains that the issue as framed does not comply with the specificity requirement of Section 309(e). The *Suburban* issue, while phrased in broad terms, is clearly delineated in the *Primer*. Thus, when read in conjunction with the *Primer*, the issue meets the requirements of Section 309(e) with regard to particularity. *Cf. Keith L. Reising*, 1 FCC 2d 1082, 6 RR 2d 431 (1965). Talquin cites no cases (and we know of none) where a *Suburban* issue has been modified, as requested here, subsequent to designation. In this case, the Board has not been persuaded by Talquin that the issue should be modified. Unlike the financial qualifications issue, which Talquin relies upon as an analogy, the parts of the *Suburban* issue are all interrelated and cannot be easily separated. Information gathered in each section is utilized in fulfilling the requirements of another. See *Primer on Ascertainment of Community Problems*, *supra*, 27 FCC 2d at 675, 21 RR 2d at 1534. However, in regard to an applicant's financial qualifications, the Commission has determined that whenever possible it will specify a narrow issue but that each circumstance is a matter for *ad hoc* determination. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 399 n.13, 5 RR 2d 1901, 1913 n.13 (1965). See also *SRC, Inc.*, 11 FCC 2d 537, 12 RR 2d 101 (1968), and the cases cited therein.[7] In the case of the *Suburban* issue, the Commission has not held that it is necessary or beneficial to limit the language of the issue as now framed. Until that happens, the Board does not consider it appropriate to modify the *Suburban* issue. That is not to say, however, that should the Hearing Examiner deem it worthwhile, he could not clarify the scope of inquiry at the time evidence is tendered at the

[7] For a full discussion of the changes an issue (*e.g.*, standard comparative issue) can undergo from general to specific to general again, see *Keith L. Reising, supra.*

hearing. *Western Connecticut Broadcasting Co.*, 26 FCC 2d 1019, 20 RR 2d 961 (1970). Therefore, the Board will not modify the *Suburban* issue as requested by Talquin.

7. Accordingly, IT IS ORDERED, That the motion for deletion or modification of Issue 2, filed March 16, 1972, by Talquin Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R–202

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALVIN L. KORNGOLD, SUN CITY, ARIZ.	Docket No. 19087 File No. BPH–6755
SUN CITY BROADCASTING CORP., SUN CITY, ARIZ. For Construction Permits	Docket No. 19088 File No. BPH–6808

MEMORANDUM OPINION AND ORDER

(Adopted July 31, 1972; Released August 2, 1972)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Alvin L. Korngold (Korngold) and Sun City Broadcasting Corporation (Sun City) for a new FM broadcast station at Sun City, Arizona. The applications were designated for consolidated hearing under various issues by Commission Order, FCC 70–1211, 35 FR 17966, published November 21, 1970. Subsequently, in response to requests by Korngold and the Broadcast Bureau, the Board added a Rule 1.65 issue against Sun City [1] and a financial and Rule 1.65 issue against Korngold.[2] Presently before the Review Board is a request for enlargement of issues, filed March 22, 1972, by Korngold, requesting the addition of nine issues against Sun City, including a strike issue and issues inquiring into alleged ineptness and misrepresentations.[3]

Timeliness

2. Korngold argues that good cause exists for the late filing of his petition because facts which he relies on to support the requested issues did not come to light until hearing sessions held on March 6, 7, 8, and 9, 1972. In opposition, Sun City argues that the facts relied upon by Korngold were known or should have been known prior to the commencement of hearing. The petitioner, Sun City argues, is attempting to circumvent the timeliness requirements of Section 1.229 by relying "upon 'stale' facts rejuvenated by the repetition of the information during the hearing." The Board is of the view that several of the alleged facts relied upon by Korngold to support his petition did not come to light until the March hearing and the opposition has not demonstrated specifically that these facts were apparent prior to the hearing; therefore, the Board believes that Korngold has shown good cause to warrant acceptance of its late filed petition.

[1] FCC 72R–120, 34 FCC 2d 712 released April 26, 1972.
[2] 31 FCC 2d 39, 22 RR 2d 661 (1971).
[3] Also before the Review Board are the following related pleadings: opposition, filed April 24, 1972, by Sun City; Broadcast Bureau's comments, filed April 24, 1972; and reply, filed May 4, 1972, by Korngold.

Strike Issue

3. In support of his request for a strike issue, Korngold asserts that Richard Gilbert, Sun City's consultant, testified at hearing that he prepared Sun City's application. Of more significance, Korngold argues, is the fact that Gilbert is the licensee of a Class C FM station assigned to Glendale, Arizona, which is only eight miles from Sun City, and that Gilbert is to be paid for his consulting services only if Sun City is granted a construction permit. Craig Mehrens, officer-director and attorney for Sun City, is also, petitioner notes, to be paid on a contingency fee basis. Korngold asserts that he was precluded by objections from the Broadcast Bureau at hearing from pursuing this line of questioning further to ascertain whether Geoffrey Lapping, Sun City's engineer, is also to be paid on a contingency fee basis.[4] The failure to report Gilbert's and Mehren's contingency fee arrangements and possibly such an arrangement with Lapping does not demonstrate a good faith effort on the part of Sun City in pursuit of its application, Korngold argues.[5] Petitioner notes that Sun City filed its application shortly after Korngold, which, petitioner asserts, also indicates an intent to impede Korngold's application. Moreover, Korngold argues, Gilbert, as a potential competitor of Sun City, stands to gain economically by frustrating or impeding a grant of Korngold's application. In conclusion, petitioner states, there is enough "circumstantial evidence" which raises serious questions as to Sun City's true motive in filing its application to warrant addition of the requested issue. The role Gilbert has played in the preparation and prosecution of Sun City's application is highly suspicious and warrants further exploration under a strike application issue against Sun City, Korngold further concludes.

4. In opposition, Sun City relies on the guidelines set forth in the *Grenco* case, *supra*, to refute Korngold's assertion that Sun City's motive for filing its application was to block or impede a grant of Korngold's application. According to Sun City, the first criterion of *Grenco*, time of filing, encompasses consideration of, not only the actual time of filing, but also the preparation effort which took place prior to filing. Sun City explains that its principals, Russell Lash and Fred Maderia, had originally gone to Arizona to investigate the possibility of purchasing a station at Show Low, Arizona: not interested in the Show Low station, Lash and Maderia questioned the owner's representative, Gilbert, to determine what other frequencies in the area were available. Gilbert, Sun City states, informed them of the FM frequency assigned to Sun City, Arizona, for which a license had not been issued. Sun City explains that Gilbert told them of his availability as a communications consultant and he was hired by Lash on March 25, 1969, as a consultant.[6] At the time Gilbert was hired, Sun

[4] Korngold notes that Lapping had been Gilbert's engineer in an effort to obtain a license for a station in Blythe, California (***Geoffrey A. Lapping,*** 36 FCC 1531, 2 RR 2d 201 (1964)), which was denied.

[5] Good faith is one of the guidelines in determining whether a strike issue should be added, Korngold asserts, citing ***Grenco, Inc.,*** 28 FCC 2d 166, 21 RR 2d 560 (1971).

[6] The following services were performed by Gilbert: (a) obtaining equipment proposals and equipment letter of credit, (b) surveying community needs, (c) arranging with construction company for antenna location and studio, and (d) filing notice of proposed construction or alteration of tower with Federal Aviation Agency.

City asserts, he was not the licensee of Station KXTC, Glendale, Arizona; the consulting contract was between Gilbert's Aircasters, Inc., a communications consulting firm, and La Deira, Inc., a Pennsylvania firm.[7] With respect to the second *Grenco criterion*, competitive advantage, Sun City points out that the 1972 Broadcasting Yearbook lists twenty-five AM, FM and non-commercial FM broadcast stations licensed to either Phoenix or to adjoining communities. Sun City also notes that the Yearbook shows six commercial FM stations and one non-commercial FM station on the air in Phoenix and adjoining communities which indicates, Sun City asserts, that one more station would not have a very significant competitive impact on KXTC. Further, Sun City argues, whether it or Korngold is granted the license, a new FM station in Sun City will be in competition with KXTC. Sun City asserts that Korngold has not shown that KXTC will have to cancel its only program from Sun City, "Luncheon at Jerry's" which, according to Sun City, is the sole economic advantage KXTC (Gilbert) derives from Sun City. As for the contingency fee arrangements with Gilbert and Mahrens, Sun City avers that both were entered into before Sun City was aware that Korngold had filed his application. Sun City concludes by asserting that every act it has taken in pursuit of its application has been done in good faith, as witnessed by the fact that it has not attempted to hide Gilbert's efforts in its behalf.[8] that its stockholders plan to expend considerable funds, and that Lash and Maderia both have made several trips to Arizona at their own expense to prepare the application and amendments thereto.

5. The Broadcast Bureau, in its comments, supports Korngold's request for a strike issue. Sun City is 3.5 air miles, border to border, from Glendale, and, the Bureau notes Glendale is contiguous to Phoenix which places the three cities in a direct line. The Bureau takes issue with Sun City's assertion that Gilbert was not the licensee of KXTC at the time he was preparing Sun City's application. The Bureau points out that Gilbert had filed his application July 31, 1968; his only opposition dropped out in April of 1969; and, Gilbert's license was granted on May 1, 1969; and asserts that facts presented in the record illustrate that most of the services performed by Gilbert were done after he was granted his license.[9] The Bureau also asserts that Gilbert was holding himself out as a representative of Sun City when no such corporate entity was in existence, that is, Gilbert was actively representing Sun City in May before it became a corporation in July. (See footnote 8). Finally, the Bureau urges that Gilbert could possibly lose revenue as a result of the development of a FM station in Sun City which could adversely affect his program "Luncheon at Jerry's". Sun City should explain, the Bureau suggests, why Lash and Maderia, Pennsylvania residents, became connected with Gilbert, an Arizona resident, and explain the contingency arrangement between Lash and Gilbert and Lash and Mehrens.

[7] Lash is president of La Deira, Inc.

[8] Sun City asserts that it has never attempted to conceal Gilbert's participation in the preparation of its application, as witnessed by a newspaper article published in the Sun City newspaper reporting two speeches made by Gilbert to Lion's Club and Kiwanis Club of Sun City concerning Sun City's application.

[9] The Bureau notes that: equipment was secured by Gilbert on April 24, 1969; he conducted surveys during the month of May; and FAA clearance was received on May 29, 1969. The Bureau also notes that Sun City's Articles of Incorporation were filed July 1, 1969, and the by-laws were adopted on July 8, 1969.

6. A strike issue is warranted when a substantial question is raised as to whether the motive behind the filing of an application is, in whole or in part, to frustrate, impede or block a competing application. See *Ashboro Broadcasting Co.* 20 FCC 2d 1, 17 RR 2d 647 (1969). In *Grenco*, *supra*, the Commission set forth the following guidelines to assist in determining whether a strike issue is warranted: (1) the timing of the application; (2) the economic and competitive benefit occurring from the application; (3) the good faith of the applicant; and (4) questions concerning a frequency selection and site location. As stated in *Grenco*, "the guidelines are just that, and each particular set of circumstances must be individually examined, since the matter of purpose or motive cannot be scientifically defined." Applying these general guidelines and taking into consideration the cases cited herein, we do not believe that a strike issue is warranted here. Although Sun City should have reported to the Commission that Gilbert prepared its application no attempt was made to hide Gilbert's participation, and failure to report such information does not suggest collusion with Sun City or warrant addition of the issue. See *Sumiton Broadcasting Co.*, 15 FCC 2d 400, 14 RR 2d 1000 (1968); and *WACO Radio Co.*, FCC 59–1238, 19 RR 538 (1959). Nor do we believe that the contingency fee arrangements between Lash and Gilbert and between Lash and Mehrens suggest a lack of good faith by Sun City in filing its application. While a possibility exists that Gilbert would stand to gain some minor economic advantage from impeding Korngold's application because the program "Luncheon at Jerry's" appears to be economically successful and could be competitively harmed by the inauguration of an FM station in Sun City, Korngold has not shown that Sun City would derive any benefit from impending or blocking Korngold's application.[10] Nor, in our opinion, is the timing of the filing of the application indicative of a strike application. It appears that Sun City began preparation of its application in March, 1969, to secure the license without any knowledge of the preparation of Korngold's application.[11] We cannot agree with the Broadcast Bureau that Gilbert's holding himself out as a representative of Sun City prior to Sun City's incorporation bears on whether a strike application issue is warranted. Also, we do not find it unusual that Lash and Maderia would hire a local representative to assist in performing such tasks as preparing the *Suburban* survey and securing antenna and studio sites. Finally, since the applicants in the proceeding are applying for an FM channel, no adverse inferences with regard to frequency studies or site selection have been raised. In short, the Board is of the view that the only allegation which actually supports petitioner's request for a strike issue is that Gilbert, Sun City's consultant, is the licensee of a nearby FM station, and this allegation is simply insufficient, of itself, to raise a substantial question warranting addition of a stike issue.

[10] Compare *United Community Enterprises, Inc.*, 18 FCC 2d 555, 16 RR 2d 742 (1969); and *Blue Ridge Mountain Broadcasting Co., Inc.*, 37 FCC 791, 2 RR 2d 511 (1964).

[11] Sun City presented affidavits from Richard Gilbert and Russell C. Lash attesting to the circumstances surrounding the filing of the application (see paragraph 4). Nothing presented by Korngold contradicts Sun City's explanation of the timing of the filing of its application.

Ineptness and Misrepresentation Issues

7. Korngold relies essentially on the same set of facts to support its request for misrepresentation and carelessness or ineptness issues. Korngold argues that the following actions by Sun City are particularly indicative of its "inexperience or carelessness": Sun City did not timely file its "comparative lay exhibits" as ordered by the Commission and subsequently directed by order of the Hearing Examiner on June 4, 1971, and its belated attempt to comply with these directives merely resulted in submission of excerpts from its Form 301 presented in Exhibit 8 and oral testimony related to the same material; Sun City submitted its stockholders' balance sheets only after prodding from the Broadcast Bureau; the balance sheets once submitted proved difficult to understand and utilize by both Korngold and the Examiner; and, Sun City has not proffered any exhibits relating to the general comparative issue specified by the Commission in the designation Order. The following alleged omissions and misstatements are not only indicative of ineptness, according to Korngold, but also support the addition of a misrepresentation issue: failure to report the contingency fee arrangement between Lash and Gilbert; failure to report Lash's "continued liability" to Sun City's director-stockholder-attorney, Mehrens; inconsistent statements by Lash that between forty and fifty thousand dollars are on deposit for use by Sun City, when Section III, question (a), of the application shows only $100 on deposit; and, finally, inconsistencies over who will control programming, i.e., in Section IV–A of Sun City's application, Sun City indicates that Edwin White, proposed general manager, will be in charge of "day to day programming, make decisions", whereas, at hearing, both White and Lash testified that programming tapes would be sent to Pennsylvania for approval before being aired and advertising spots and public service announcements would be checked out by daily phone calls to Pennsylvania.

8. In opposition, Sun City argues that the information which Korngold asserts Sun City failed to supply dealt with materials used in preparation for, and at, the hearing held the week of March 6, 1972. All the exhibits and oral testimony presented by Sun City during that week relate to matters in issue, Sun City argues. The contract between Lash and Gilbert, Sun City recites, as originally written was between Aircasters, Inc. and La Deira Corporation. The written contract was changed to an oral personal contract between Lash and Gilbert. Sun City continues, and the contract between Lash and Mehrens is also a personal oral contract; therefore, neither contract was required to be reported to the Commission. Sun City asserts that Korngold has misinterpreted the testimony Lash gave at hearing. Lash testified at hearing that his personal bank account amounted to something between forty to fifty thousand dollars which would be available for use by Sun City, Sun City states; while as a corporation, Sun City has on deposit in its bank account $100, as stated in the application. Sun City concedes that programming tapes will be sent to Pennsylvania for approval and telephoning will take place but not, as Korngold asserts, on a daily basis. Sun City concludes by asserting that the Hearing Examiner is charged with determining whether testimony at hearing

and exhibits are consistent with the presentation in the application and what effect if any this will have on applicant's application. The Bureau urges that Korngold has not adequately supported his requests for misrepresentation and ineptness issues, as required by Section 1.229(c) of the Commission's Rules; therefore, the Bureau does not support the addition of these requested issues.

9. The Board will deny Korngold's requests for misrepresentation and ineptness issues. Nothing in the Commission's Rules requires the reporting of such personal contracts such as those entered into between Lash and Gilbert, and Lash and Mehrens; therefore, Sun City's failure to inform the Commission of these personal contracts cannot be considered to be a misrepresentation. We believe that Sun City's responsive pleading clears up possible confusion by Korngold as to the amount Sun City has on deposit. Sun City stated that it has $100 on deposit in the bank and Lash testified that he had between forty and fifty thousand on deposit in his personal account which would be made available to Sun City. Further, in our opinion, Sun City has not misrepresented who will be in charge of programming. It appears that White as general manager will merely be consulting with Sun City's president, Lash, in Pennsylvania. Korngold does not refer to any portion of the record from the hearing held the week of March 6, 1972, in which Lash or White indicated that White would not have the control over programming, as indicated in Sun City's application. Finally, with respect to the requested ineptness issue, such an issue is warranted when a substantial question is raised as to whether there have been repeated errors, inaccuracies, nondisclosures or material facts and/or inadvertent statements relating to significant matters at issue. See *Beaman Advertising, Inc.*, FCC 63R-467, 1 RR 2d 285 (1963). We do not believe the facts just recited above nor the method of presentation and contents of Sun City's exhibits [12] to be indicative of a pattern of carelessness and inadvertance warranting addition of the issue. Several of the alleged examples of carelessness have been adequately explained by Sun City, as indicated above and the others are not so numerous or serious as to reflect on that applicant's qualifications. See *Edward G. Atsinger, III*, 29 FCC 2d 443, 21 RR 2d 1039 (1971); and *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 175, 20 RR 2d 528 (1970).[13] Under all of the circumstances here, the Board perceives no valid reason for further inquiry into this matter at the evidentiary hearing.

10. Accordingly, IT IS ORDERED, That the request for enlargement of issues, filed March 22, 1972, by Alvin L. Korngold IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[12] It is rudimentary hearing procedure that each party to the proceeding determines what exhibits he will present. As Sun City points out, if the exhibits are deficient then it will work to the disadvantage of the party submitting the exhibit in the form of a demerit awarded by the Examiner in his Initial Decision.

[13] Korngold in his reply pleading asserts that Sun City should have amended its application to reflect the contingency fee arrangement with Mehrens because the application reflects that $2500 is to be spent on legal fees, and under the contingency fee arrangement the $2500 could be exceeded. The Board believes Sun City's opposition pleading satisfactorily responds to Korngold's assertion, that is, the contract is between Mehrens and Lash and not between Sun City and Mehrens. Further, the Board will not entertain allegations raised in a reply pleading for the first time. See *Phil D. Jackson*, 33 FCC 2d 928, 23 RR 2d 1023 (1972); *Allir Broadcasting Co., Inc.*, 12 FCC 2d 163, 12 RR 2d 986 (1968).

F.C.C. 72-747

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LAKES AREA BROADCASTING CO., LICENSEE OF STATION KOLS AND KKMA (FM), PRYOR, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released August 30, 1972)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER WILEY CONCURRING IN THE RESULT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has under consideration (1) its Notice of Apparent Liability, dated January 26, 1972, addressed to Lakes Area Broadcasting Co., licensee of Radio Station KOLS and KKMA(FM), Pryor, Oklahoma; and (2) the licensee's response to the forfeiture notice, dated February 24, 1972.

2. The Notice of Apparent Liability stated that monitoring of KKMA(FM) programs had disclosed that the licensee failed to broadcast the station's call letters immediately followed by the name of the community or communities specified in its license as the station's location, which is required under Section 73.1201(b)(1) of the Commission's Rules. Instead the licensee announced as follows ". . . The time is 29 minutes after the hour of nine o'clock and you're listening to Owasso Radio Service . . . until 11:30 tonight—got two more hours to go—stay with us—over KKMA(FM), 104.5 on your FM dial, headquarters studios in Pryor, studios in Vinita . . . and studios in Owasso." Licensee also made announcements at other times that indicated or attempted to lead the station's audience to believe that the station has been authorized to identify with other cities than those permitted in violation of Section 73.1201(b)(3). For example, licensee broadcast, on more than one occasion, the following misleading announcement, "You're listening to Vinita Radio Service, studio, 123 East Illinois, Vinita, Oklahoma—KKMA(FM)—104.5 on your FM radio dial—headquarters studio Pryor, studios Vinita and studios in Owasso, Oklahoma. . . ."

3. The forfeiture notice also alleged that the licensee had refused permission to two persons to inspect files which Sections 73.120(d), 73.290(d) and 1.526 of our Rules require to be made available for public inspection. The files included its record of requests for broadcast time by political candidates and the disposition thereof and any charges made. When investigators examined the file labeled "public

file" it was found that the records specified in the Rules were not contained therein.

4. Additionally, during the field investigation it was found that the licensee was using a class "C" line for transmitting voice and music from two auxiliary studios to the KKMA(FM) transmitter. Such use of class "C" lines was in violation of Section 73.317 of the Rules.

5. Licensee denies any ulterior motive, design or necessity to mislead listeners and states that the announcements used for program originations in its remote studios were for the convenience of listeners outside the Pryor, Oklahoma area. Licensee further states that the use of a remote studio at Vinita, Oklahoma has been discontinued and therefore, that this question is now moot.

6. In response to the allegation that it refused to permit inspection of its public files, licensee states that the refusal was to protect the licensee's business interests.

7. Licensee has not responded to the allegation regarding the use of the class "C" line by KKMA(FM) for transmitting voice and music.

8. Licensee states that the investigation failed to prove willful or malicious intent, and that its president's broadcast record over the past 24 years indicates his "consistent and conscientious" intent to serve the public.

9. The licensee's reply to the forfeiture notice has provided no factual information which was not considered by the Commission in its assessment of the forfeiture in this case, and we believe that the licensee has failed to advance sufficient reason to justify remission or reduction of the amount of liability assessed in the Notice of Apparent Liability.

10. In view of the foregoing, IT IS ORDERED, That Lakes Area Broadcasting Co., licensee of Radio Stations KOLS and KKMA(FM), Pryor, Oklahoma, FORFEIT to the United States the sum of two thousand dollars ($2,000) for violation of Section 1.526, 73.1201(b)(1) and (3), 73.317, 73.120(d) and 73.290(d), of the Rules. Payment of the forfeiture may be made by mailing a check or similar instrument drawn to the Order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Lakes Area Broadcasting Co., licensee of KOLS and KKMA(FM), Pryor, Oklahoma.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72–722

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
PACIFIC FM, INC., RADIO STATION KIOI (FM), SAN FRANCISCO, CALIF.
For Declaratory Ruling Re Multiplex Transmission

AUGUST 9, 1972.

FLETCHER, HEALD, ROWELL, KENEHAN & HILDRETH,
Attorneys at Law,
Suite 400, 1225 Connecticut Avenue NW.,
Washington, D.C. 20036

GENTLEMEN: This refers to your request for declaratory ruling filed April 6, 1972, on behalf of Pacific FM, Incorporated, licensee of radio station KIOI (FM), San Francisco, California. You ask whether this and other FM broadcast stations may engage in discrete four-channel multiplex transmission without specific Commission authority. We hold they may not.

Pacific FM heretofore requested and obtained temporary experimental authority to field test the so-called Dorren Quadraplex System. The test program was authorized under section 73.262(b) of our rules, and was concluded on or about January 30, 1971. A technical report on the results obtained from the experimental operation was filed in May 1971. Relying on these test results, you now contend that the Dorren system is compatible with the present rules governing two-channel stereo and, therefore, that music transmitted by this method may be routinely offered to the public without further specific authorization.

To put the matter in proper perspective, the four-channel stereo systems being marketed today are pseudo-enhancement devices relying on a phase-differential principle to achieve four-channel audio effects. Since this method of enhancement can be accomplished within the Commission's present FM stereo transmission standards, no specific Commission authorization need be issued to the broadcast licensee.

These pseudo systems should not be confused with discrete four-channel multiplex transmission, like Dorren, which thus far has been authorized only on a limited, experimental basis. Two petitions for rule making have been filed, one by Pacific FM Incorporated (RM–1847) and the other by the General Electric Co. (RM–1984). Pacific FM's petition proposes that a new section 73.323 be added to accommodate discrete four-channel multiplex operation. More specifically, section 73.323(1)(3), as proposed by Pacific FM, would read as follows:

> The quadrature subcarriers are the second harmonic of the pilot subcarrier. The sine carrier crosses the time axis with a positive slope simultaneously

with each crossing of the time axis by the pilot subcarrier. The cosine subcarrier crosses the time axis 45 degrees lagging the pilot subcarrier.

Existing section 73.322(c), however, reads as follows:

The stereophonic subcarrier shall be the second harmonic of the pilot subcarrier and shall cross the time axis with a positive slope simultaneously with each crossing of the time axis by the pilot subcarrier.

Since the present rules permit the transmission of only a single sine subcarrier, it follows that they would be violated by the addition of a cosine subcarrier.

Your proposal for section 73.323(k) reads as follows:

(k) Quadraphonic Subchannel—The band of frequencies from 61 to 91 kHz containing the quadraphonic subcarrier and its associated sideband.

However, present section 73.310 defines the permissible percentage of modulation as follows:

. . . For FM broadcast stations a frequency swing of ±75 kilocycles is defined as 100 percent modulation.

Moreover, 73.268 requires that modulation be limited, essentially, to 100 percent. While it is recognized that during normal operation modulation products are produced which exceed 75 kilocycles, this fact was considered in establishing the necessary protection ratios for co-channel and adjacent channel stations. Accordingly, when action is taken on your petition, consideration must necessarily be given to the effect of increased bandwidth on existing protection ratios and the need, if any, for the establishment of new ratios.

We do not feel it necessary at this time to consider, point by point, the additional changes in existing rules proposed in RM–1847; the above examples suffice to demonstrate that routine operation with the system you propose would result in violation of existing rules.

Although no assurance can be given as to precisely what transmission standards (if any) will ultimately be adopted for discrete-channel stereo, please be assured of our continuing interest in this matter.

Commissioners Robert E. Lee, Acting Chairman; H. Rex Lee and Wiley acting as a Board.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72R–201

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of LAURENCE N. POLK, JR., TRANSFEROR AND TIMES-JOURNAL, INC., AND M. W. KINNEY, JR., TRANSFEREES For Transfer of Control of Jonquil Broadcasting Co., Licensee of Station WYNX, Smyrna, Ga.	Docket No. 18784 File No. BTC–5659

APPEARANCES

Laurence N. Polk, Jr., pro se; Arthur Stambler and *B. Jay Baraff*, on behalf of Times-Journal, Inc. and M. W. Kinney, Jr.; and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 31, 1972; Released August 2, 1972)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Laurence N. Polk, Jr. (Polk) (Transferor) and Times-Journal, Inc. (Times-Journal) and M. W. Kinney, Jr. (Kinney) (Transferees) for transfer of control of Jonquil Broadcasting Co. (Jonquil), licensee of Station WYNX, a Class II standard broadcast station located in Smyrna, Georgia. Under the proposed transfer, Times-Journal would acquire a 75% stock interest, and Kinney the remaining 25% interest in the licensee. By Order, FCC 70–66, 21 FCC 2d 178, released January 26, 1970, the Commission designated the application for hearing on the following issues:

> 1. To determine whether a grant of the application will cause an undue concentration of control of local mass media in Smyrna, Georgia and environs within the meaning of Section 73.35 of the Commission's Rules.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether grant of the above-captioned application would be in the public interest.

On July 1, 1971, Hearing Examiner Forest L. McClenning released an Initial Decision (FCC 71D–36) proposing to deny the transfer application. As summarized at para. 68 of the Initial Decision, the Hearing Examiner concluded that:

> The concentration of control over mass media of communications in Smyrna and its environs which led to the initial concern of the Commission in designating the application for hearing has, however, been fully established by the record. The benefits urged by transferees as to improvement in the technical and news operation of the station under the proposed transfer are from a public service standpoint insubstantial if implemented and, because of a lack of specific pro-

posals, largely speculative. Under the present ownership, Station WYNX does provide a local transmission facility to Smyrna and its environs independent of transferee's dominant media in that area and in full accord with the Commission's suburban station policies. If the Commission's concern as to diversification of the ownership of mass media is to be given meaning in the context of this proceeding there is no possible ground upon which an affirmative finding that the proposed transfer would serve the public interest can be based.

2. Times-Journal and Kinney have filed exceptions to the Initial Decision which urge the Review Board to grant the proposed transfer of WYNX. Oral argument was held before a panel of the Board on June 20, 1972. We have reviewed the Initial Decision in light of the exceptions of the transferees, the Broadcast Bureau's reply, the arguments of the parties, and our examination of the record. We find the Hearing Examiner's findings of fact to be substantially accurate and his conclusions persuasive. Moreover, the Examiner has, in our view adequately dealt with the arguments raised in the exceptions and supporting brief, and no useful purpose would be served by further discussion here. Therefore, except as modified in the rulings on exceptions contained in the attached Appendix, the Initial Decision is hereby adopted.

3. Accordingly, IT IS ORDERED, That the application (BTC–5659) of Laurence N. Polk, Jr. (Transferor) and Times-Journal, Inc. and M. W. Kinney, Jr. (Transferees) for transfer of control of Jonquil Broadcasting Co., licensee of Station WYNX, Smyrna, Georgia, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER,
Member, Review Board.

APPENDIX

RULINGS ON EXCEPTIONS OF TIMES-JOURNAL, INC., AND M. W. KINNEY, JR. TO THE INITIAL DECISION

Exception No.	*Ruling*
1	*Denied.* The Examiner's findings accurately reflect the evidence of record concerning Mr. Brumby's authority and participation in the operation of the newspaper.
2, 3, 5, 6, 9	*Granted.* The requested findings are supported by the record.
4	*Denied* (a) to the extent that Judge Ravan never agreed that the fact that *Daily Journal* presented his advertisements was very fair, but rather responded in the positive to a question on cross-examination as to whether the acceptance of the advertisements was "pretty fair of them [the newspaper]" and went on to say that he did not "believe they could have refused it [the advertisements]" (Tr. 971); and (b) to the extent that the fact that Judge Ravan won the election despite the opposition of the *Daily Journal* is of no decisional significance.
7, 16, 17	*Denied.* The requested findings set forth in Ex. 7 relating to the relationship between Smyrna and Atlanta are already adequately and fairly reflected by the Examiner's findings at paras. 41 and 42 of the Initial Decision. These requested findings ignore completely the Examiner's conclusions at para. 60 rejecting the Transferee's arguments that what is involved here is the Atlanta Standard Metropolitan Statistical Area. No exception was taken by the Transferee to para. 60 of the Initial Decision. Moreover, it is to be noted that this record does not establish by substantial evidence the exceptor's contention that

Exception No.	*Ruling*
	Smyrna is a bedroom community of Atlanta. Exception Nos. 16 and 17 are nothing more than argumentative conclusions, buttressed by the same basic contention of the Transferee, which is rejected at para. 60 of the Initial Decision, and are denied for the reasons stated there.
8	*Granted*, in part, and *Denied*, in part. With the exceptions indicated below, the requested findings are supported by the record. We believe that the Examiner's findings on the subject of service to Smyrna and environs by competing mass media are adequate and sufficient. Nevertheless, we have no objection to the somewhat fuller statement proposed by exceptors. However, the record does not demonstrate that Smyrna "is an integral part of the Atlanta Metropolitan community . . . and so amply served by the multiple communities facilities . . ."; WQXI–FM's responses to interrogatories indicate that it provides little meaningful service directed to the specific needs of Smyrna; the assumption is unsupported that because WBIE–AM and FM devote 25 percent of their news to local and regional matters, they devote intensive coverage to Smyrna, Marietta and Cobb County; the record does not support a finding that the zoned editions of the *Atlanta Journal* and *Constitution* are, in effect, local papers; and the statements in the final two lines of paragraph 15 of the findings proposed by the Transferee in the instant exception were properly rejected by the Examiner at hearing for lack of competency.
10	*Denied*, in part, and *Granted*, in part. The record citations relied upon do not support the contentions concerning Mr. Hubert's "scathing hostility", "irrationality", or alleged characterization of the campaign financing story as "objective". Granted, in all other respects.
11	*Denied*, in part, and *Granted*, in part. The record citation relied upon indicates that Mr. Britt reads the paper occasionally, although he does not see the paper on any regular basis. Granted, in all other respects.
12	*Denied*. The record does not support the requested finding set forth in the last sentence; it is unclear. *Granted* in all other respects as supported by the record.
13	*Denied* to the extent that the facts that James Freeman had done business with Laurence Polk, Jr. and "could not state for a certainty" that a car purchased from Freeman by Polk was not purchased on a "trade basis" are of no decisional significance; and *granted* in all other respects as supported by the record.
14, 20	*Denied*, in part, and *Granted*, in part. By Ex. 14 the applicant, in essence, requests greater detail to be set forth in paras. 56–58 of the Initial Decision concerning its proposal separating its newspaper operations from its operation of the radio station, as well as greater detail with respect to the improvements which Transferee proposes to make in WYNX. Although we believe that the findings of fact of the Initial Decision now adequately reflect the basic facts concerning these commitments by the Transferee, Ex. 14, nevertheless, is granted merely to provide the greater detail, as requested. However, even as modified by this greater detail, these findings do not support the conclusions requested by the Transferee in its Ex. 20. First, they do not support the conclusion that "the current level of WYNX programming will be substantially exceeded by grant of the instant application." Nor do these findings relating to the separation of the newspaper operations from the operation of the station warrant overriding weight in the resolution of the public interest

Exception No.	*Ruling*
	determination under the circumstances of this case involving the unique facts (a) of a small radio market, (b) of its only AM radio station, (c) of a Transferee who now occupies the position of a dominant local media owner in this small market, (d) of resulting common control of the local radio and newspaper operations due to cross-ownership and the fact that the Chief Officer of the newspapers would, likewise, be the Chief Officer of the radio station, and (e) of a transfer and assignment application where a denial will not result in loss of service to the public.
15	*Denied* to the extent (a) that the first sentence of the exceptor's requested findings is incorrect in stating that WYNX currently has only one part-time newsman; (b) that the record does not clearly establish that neither of WYNX's two news-gathering employees has ever had experience as a news director at another station; and (c) that, while WYNX obtains news leads from the *Daily Journal* and the *Smyrna Neighbor*, the record does not show clearly the extent to which WYNX relies upon such local news stories. Although the record establishes that WYNX verifies such local news stories, there is no evidence as to the extent, if any, WYNX broadcasts such stories verbatim over the air, without rewriting to reflect the station's own style and comments. *Granted* in all other respects as supported by the record.
18	*Granted* to the extent that the issues involving the Commission's Policy on Section 307(b). Considerations for Standard Broadcast Facilities Involving Suburban Communities are not specified in this proceeding, and the specific requirements of that Policy Statement are irrelevant. However, the Hearing Examiner in referring to the Policy Statement merely did so to reiterate the Commission's strong allocation objective in the establishment, as well as maintenance, of a local transmission facility in every community of substantial size, including suburbs, where such a local transmission facility primarily serves the local needs of that community. Moreover, there is nothing in this record to indicate that WYNX's general programming would not meet its secondary responsibilities in providing programming outside of the immediate Smyrna-Marietta communities. In any event, WYNX's *renewal application* is not involved in this proceeding; nor are there any issues directed to its community ascertainment efforts.
19	*Denied*. As indicated by our ruling on Ex. 8, the Examiner's findings at paras. 43–45 constitute a fair recapitulation of the record evidence, although not in the detail requested by the exceptor. Hence, to that extent we have modified those findings in our prior ruling to include most of the detail requested by the exceptor. However, this detail in no way requires modification of any portion of para. 65 of the Initial Decision. For this record is clear that irrespective of the number of stations which render a technically acceptable signal to Smyrna, their program service directed to Smyrna has been minimal.
21	*Denied*. None of the cited cases provide support for the Transferees' position. Both *Lee Enterprises, Inc.*, FCC 70D–18, released April 15, 1970; and *Cumberland Gap Broadcasting Co.*, FCC 70D–24, released May 28, 1970, are Initial Decisions of Hearing Examiners and, therefore, not binding precedent. See *Public Notice—G, FCC 61–25, Mimeo 98192, Finalization of Initial Decision*, released

109–008—72——6

Exception No.	*Ruling*
	January 6, 1961. In any case *Lee* is distinguishable from the instant situation in that the community there in question, Billings, Montana did not constitute a small radio market; it is the second largest city in Montana situated in the 204th urbanized area in the United States; it had nine broadcast stations apart from the new FM station which that applicant sought. In *Cumberland Gap*, Middleboro, Kentucky, which is also a small radio market similar to Smyrna here, that community had an AM facility apart from the AM station owned by the applicant who sought a new FM facility. In *WGRY, Inc.*, 2 RR 2d 718 (1964); *North Atlanta Broadcasting Co.*, 37 FCC 1145, 4 RR 2d 476 (1964); *Lewistown Broadcasting Co.*, 3 RR 2d 23 (1964); *Times-Herald Printing Company*, 25 FCC 2d 984, 19 RR 2d 169 (1970); and *Providence Journal Co.*, 19 FCC 2d 257, 16 RR 2d 693 (1969), the areas in question were assigned other broadcast facilities, in some cases (*i.e.*, *Providence Journal* and *Times-Herald*), many such facilities. In addition, in the *North Atlanta* and *Providence Journal* cases, the area of concern was regional or state-wide, which is not the case in this proceeding. Finally, in *WGRY, Lewistown, Grants Broadcasting Co., Inc.*, 3 RR 2d 657 (1964); *Times-Herald* and *Providence Journal*, the Commission found that issues of concentration were not *presented*, whereas the opposite is true here, not only because the Commission designated this application for hearing, but also because the Commission affirmatively evidenced its concern over this fact of undue concentration in preamble recitations of the designation Order, *James B. Childress*, 3 FCC 2d 22, 8 RR 2d 250 (1966), presented a factual situation and raised questions unlike those involved here. The citation of *Midwest Radio-Television, Inc.*, 24 FCC 2d 625, 19 RR 2d 861 (1970) and *Radio-Active Broadcasting, Inc.*, 22 RR 665 (1961), is completely inexplicable. In *Midwest* the Commission determined that it would not be appropriate to consider media concentration at all in the context of the particular proceeding involved. *Radio-Active* simply dealt with the scope of issues under the Commission's multiple ownership rules and is in no way relevant to the instant case.
22	*Denied.* See paragraphs 60–67 of the Initial Decision.

F.C.C. 71D-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of LAURENCE N. POLK, JR., TRANSFEROR AND TIMES-JOURNAL, INC., AND M. W. KINNEY, JR., TRANSFEREES For Transfer of Control of Jonquil Broadcasting Co., Licensee of Station WYNX, Smyrna, Ga.	Docket No. 18784 File No. BTC-5659

APPEARANCES

Philip M. Baker on behalf of Laurence N. Polk, Jr.; *Arthur Stambler, B. Jay Baraff* and *Otis A. Brumby, Jr.* on behalf of Times-Journal, Inc. and M. W. Kinney, Jr.; and *Walter C. Miller* and *Michael W. Faber* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER FOREST L. MCCLENNING

(Issued June 28, 1971; Released July 1, 1971)

PRELIMINARY STATEMENT

1. By order released January 26, 1970, pursuant to the provisions of Section 309(e) of the Communications Act of 1934, as amended, the Commission designated the above-captioned application for hearing on the following issues:

(a) To determine whether a grant of the application will cause an undue concentration of control of local mass media in Smyrna, Georgia and environs within the meaning of Section 73.35 of the Commission's rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether grant of above-captioned application would be in the public interest.

Prehearing conferences were held on March 13, 1970 and April 2, 1970. Hearing was held on various dates in June of 1970 and the record closed by order released October 30, 1970. Proposed findings of fact and conclusions of law were filed by Times-Journal, Inc. and M. W. Kinney, Jr. and by the Broadcast Bureau on December 4, 1970. Reply findings of fact were filed by Times-Journal, Inc. and M. W. Kinney, Jr. on December 30, 1970.

FINDINGS OF FACT

Stations WYNX and WBLJ

2. Station WYNX Smyrna, Georgia is a Class II standard broadcast station operating daytime only on Mexican Clear Channel 1550

kHz, with 10 kilowatts power. Laurence N. Polk, Jr. acquired control of the licensee Jonquil Broadcasting Company on May 4, 1966. He has continued to own and operate the station since that date devoting full time to its operation. He has no other broadcast interests or interests in other media of mass communications.

3. Under the proposed transfer of control Times-Journal, Inc. would acquire a 75% stock interest and M. W. Kinney, Jr. a 25% stock interest. The officers, directors and stockholders of Jonquil Broadcasting Company would then be as follows:

Name and residence	Office	Stock interest	
		Shares	Percentage
Elisabeth D. Brumby, Marietta, Ga.	Chairman of board and director		
Otis A. Brumby, Marietta, Ga.	President and director		
M. W. Kinney, Jr., Marietta, Ga.	Vice president and director	20	25
Stanley Whitaker, Marietta, Ga.	Vice president and director		
Myrna Whitaker, Marietta, Ga.	Secretary and director		
Mrs. George M. Foster, Marietta, Ga.	Treasurer		
Harold Willingham, Marietta, Ga.	Director		
Times-Journal, Inc., Marietta, Ga.		60	75

4. Principals of Times-Journal, Inc. hold a 60% interest in North Georgia Radio, Inc., licensee of Station WBLJ Dalton, Georgia. Station WBLJ is a Class IV standard broadcast station operating on the facilities 1230 kHz, 250 w–1 kw power, unlimited time. The officers, directors and stockholders of North Georgia Radio, Inc. are as follows:

Name	Office	Ownership interest (percent)
Werner Wortsman	President and director	40
Robert Fowler	Vice president and director	15
Brooks T. Smith	Secretary-treasurer and director	15
Myrna Whitaker	Director	15
Elisabeth D. Brumby	Director	15

5. Smyrna, in Cobb County, is situated about 62 miles southeast of Dalton, the county seat of Whitfield County. Neither Smyrna nor Dalton is part of an urbanized area. Smyrna is, however, within the Atlanta, Georgia Standard Metropolitan Statistical Area. The latter is comprised of the following five counties: Fulton, Cobb, Clayton, DeKalb, and Gwinnett. The area between Atlanta and Smyrna is occupied by Vinings and the Chattahoochie River, which forms the northwest boundary of both Atlanta and its urbanized area. Marietta lies to the northwest of Smyrna and is separated therefrom by some four miles. The table below sets forth the pertinent population statistics as reflected by the 1960 U.S. Census and by the preliminary reports of the 1970 U.S. Census:

	Population	
	1960	1970
Cobb County	114,174	196,616
Smyrna	10,157	19,027
Whitfield County	42,109	53,846
Dalton	17,868	18,570
Atlanta	487,455	487,553
Atlanta SMSA	1,017,188	1,373,629

The operating broadcast facilities licensed to the several communities are as follows:

Smyrna	AM	WYNX	1,550 kHz, 10 kw, day.
	FM	WQXI–FM	94.1 MHz, 100 kw/410 ft.
Dalton	AM	WBLJ	1,230 kHz, 0.25 kw/1 kw, U.
		WRCD	1,430 kHz, 1 kw, day.
		WTTI	1,530 kHz, 10 kw, DA–2 (CH), day.
Atlanta	AM	WPLO	590 kHz, 5 kw, DA–N, U.
		WSB	750 kHz, 50 kw, U.
		WQXI	790 kHz, 1 kw/5 kw, DA–N, U.
		WERD	860 kHz, 1 kw, day.
		WGST	920 kHz, 1 kw/5 kw, U.
		WIIN	970 kHz, 5 kw, DA, day.
		WGUN	1,010 kHz, 10 kw, 50 kw (CH), day.
		WGKA	1,190 kHz, 1 kw, day.
		WIGO	1,340 kHz, 0.25 kw/1 kw, U.
		WAOK	1,390 kHz, 5 kw, DA–N, U.
		WYZE	1,480 kHz, 5 kw, day.
	FM	WABE	90.1 MHz, 4.6 kw/320 ft. (Ed.)
		WREK	91.9 MHz, 40 kw/135 ft. (Ed.)
		WGKA–FM	92.9 MHz, 100 kw/590 ft.
		WKLS–FM	96.1 MHz, 100 kw/840 ft.
		WSB–FM	98.5 MHz, 100 kw/740 ft.
		WLTA–FM	99.7 MHz, 100 kw/1,000 ft.
		WPLO–FM	103.3 MHz, 25 kw/280 ft.
	TV	WSB–TV	Ch. 2, 100 kw/1,040 ft.
		WAGA–TV	Ch. 5, 100 kw/1,070 ft.
		WQXI	Ch. 11, 275 kw/1,040 ft.
		WTCG	Ch. 17, 851 kw/1,040 ft.
		WETV	Ch. 30, 776 kw/1,090 ft. (Ed.)
		WATL–TV	Ch. 36, 2,030 kw/1,090 ft.

6. In addition to Stations WYNX and WQXI–FM, 11 AM, 7 FM and 6 TV stations provide service as defined under the Commission's Rules to 100% of the city of Smyrna. Two additional AM stations provide service to 25% of the area of Smyrna. Of the 20 aural services, 15 are from stations licensed to the city of Atlanta. All television service is from Atlanta stations.

7. The transmitter sites of Stations WYNX and WBLJ are separated by 62 miles. The daytime 1 mv/m contour of each station encompasses a circular area 19 miles in radius. The two contours fail to overlap by approximately 24 miles. The daytime primary service area of each station as defined by the 0.5 mv/m contour is also circular in shape and extends from the respective transmitter sites a distance of 26 miles. The primary service areas fall short of overlapping by 12 miles.

8. Station WYNX provides primary service to an area of 2,160 square miles having a population of 583,992 persons. This area is distributed over 14 counties as follows:

County	Area (square miles)	Population	WYNX primary service			
			Area (square miles)	Percent of area	Population	Percent
Bartow	463	28,267	145	31	8,047	28
Carroll	495	36,451	5	1	199	0.5
Cherokee	414	23,001	288	70	18,525	81
Clayton	149	46,365	73	49	10,895	23
Cobb	346	114,174	346	100	114,174	100
DeKalb	269	256,782	211	78	107,106	42
Douglas	201	16,741	158	79	11,088	68
Fayette	199	8,199	9	5	281	3
Forsyth	223	12,170	40	18	3,070	25
Fulton	523	556,326	477	91	282,218	51
Gwinnett	436	43,541	119	27	16,255	37
Henry	331	17,619	4	1	187	1
Paulding	318	13,101	277	87	11,830	91
Polk	312	28,015	8	3	117	4

9. Of the population within the service area of WYNX, 379,885 persons reside in urban areas. These areas and the other aural broadcast services (AM–2 mv/m or greater; FM–1 mv/m or greater) thereto are as follows: [1]

Urban place	Urban population	Population served		Other services (minimum/maximum)		
		Persons	Percent	AM	FM	Aural
Atlanta	487,455	243,278	50	14/17	14/15	28/32
Atlanta (urbanized area)	146,751	54,965	37	9/17	14/15	23/32
Chamblee	6,635	6,635	100	12/11	14/14	26/25
Doraville	4,437	3,550	80	11/9	14/14	25/23
Fair Oaks	7,969	7,969	100	11/11	15/15	26/26
Mableton	7,127	7,127	100	13/13	15/15	28/28
Marietta	28,335	28,335	100	8/11	15/15	23/26
Marietta East	4,535	4,535	100	11/11	15/15	26/26
North Atlanta	12,661	12,661	100	11/13	14/15	25/28
Roswell	2,983	2,983	100	7/8	14/14	21/22
Smyrna	10,157	10,157	100	10/14	15/15	25/29

10. All rural portions of the area served by WYNX receive AM primary service (0.5 mv/m or greater) from 6 stations and in part from 30 others and FM service (1 mv/m or greater) from 4 stations and in part from 11 others. In combination these stations make available in various portions from 9 to 21 AM services, 5 to 12 FM services, and 14 to 31 aural services. All of the area receives Grade B coverage from six Atlanta television stations. Broadcast stations located in the various communities within WYNX's primary service area include 22 AM stations (11 in Atlanta), 12 FM stations (8 in Atlanta) and 6 TV stations, all in Atlanta.

11. All of Dalton receives AM primary service (2 mv/m or greater) from at least five stations including WRCD and WTTI; FM service (1 mv/m or greater) from at least four stations located in Chattanooga, Tennessee; and Grade B service from three TV stations also located in Chattanooga. Other broadcast stations located within WBLJ's service area include 13 AM stations, 5 FM stations, and 4 TV stations.

[1] All of these areas receive a Grade B or better signal from the six operating television stations in Atlanta. The 5 mv/m contour of WYNX includes approximately 25% of the area of Atlanta.

Times-Journal, Inc.

12. Times-Journal, Inc. owns and publishes the Marietta Daily Journal and has the controlling interest in Neighbor Newspapers, Inc., publisher of 24 weekly newspapers in the greater Atlanta area. The officers, directors and stockholders of Times-Journal, Inc. are as follows:

Name and residence	Office	Stock interest	
		Shares	Percent
Elisabeth D. Brumby, Marietta, Ga.	Chairman of the board, treasurer, and director.	33⅓	7
Elisabeth D. Brumby, Executrix, Otis A. Brumby estate.[2]		266⅓	53
Otis A. Brumby, Jr., Marietta, Ga.	President and director	(1)	
Stanley Whitaker, Marietta, Ga.[1]	Vice president and director	109⅜	22
Myrna Whitaker, Marietta, Ga.[1]	Secretary and director	39⅜	8
Brooks P. Smith, Marietta, Ga.	Director	26¼	5
Robert D. Fowler, Lawrenceville, Ga.[2]	Director	25	5

[1] Otis A. Brumby and Mrs. Earl T. Leonard, Jr. have equal vested remainder interests in the 266⅓ shares of stock owned by the estate of Otis A. Brumby. Elisabeth D. Brumby has a life estate interest in the 266⅓ shares. Otis A. Brumby and Mrs. Earl T. Leonard, Jr. are children of Elisabeth D. Brumby.

[2] Robert D. Fowler is a first cousin of Otis Brumby and Mrs. Leonard. Stanley and Myrna Whitaker are husband and wife.

13. Times-Journal, Inc. was formed November 3, 1951 and stemmed from the merger of the Marietta Daily Journal, a daily Marietta newspaper, with the Cobb County Times, a weekly newspaper owned by Mr. Otis Brumby, Sr. Times-Journal, Inc. published the Marietta Daily Journal and the Cobb County Times as separate newspapers until 1968 or 1969. At that time Cobb County Times ceased publication as a weekly newspaper and became a Sunday supplement to the Marietta Daily Journal. It now carries TV logs and color comics and is inserted in the Marietta Daily Journal each Sunday. The Marietta Daily Journal is published daily except Saturday.

14. On October 22, 1960 Times-Journal, Inc. and M. William Kinney, Jr. purchased the Smyrna Herald, Inc. which published the newspaper Smyrna Herald. In January of 1969 the name of the paper was changed to the Smyrna Neighbor.

15. On November 17, 1961 Times-Journal, Inc. purchased Community Press Company which at that time published a newspaper in Roswell, Georgia known as The North Fulton Herald and The Sandy Springs Enterprise. The North Fulton Herald was thereafter separated into two papers, the Roswell Herald and the Alpharetta Sun. Publication of the Sandy Springs Enterprise was continued.

16. On March 1, 1962 Times-Journal, Inc. purchased the Mableton Printing Company, Inc. which published the newspaper The Mableton Mail. On February 3, 1968 The Mableton Mail was broken into three publications, The Mableton Mail, The Austell Mail and The Powder Springs Mail. On January 1, 1969 the names of these papers became The Mableton Neighbor, The Austell Neighbor and The Powder Springs Neighbor.

17. On January 2, 1963 Times-Journal, Inc. purchased The North Cobb Printing Company which published The North Cobb News. Sometime before 1967 this company also began publishing a newspaper known as The Woodstock Star. In February of 1968 The North Cobb

News was broken into two newspapers known as the Acworth News and The Kennesaw Beacon. Publication of The Woodstock Star was continued. On January 1, 1969 the names of these papers became The Acworth Neighbor, The Kennesaw Neighbor and The Woodstock Neighbor.

18. Northside Neighbor, Inc., a wholly owned subsidiary of Times-Journal, Inc. began publication of The Northside Neighbor on February 29, 1968. The Sandy Springs Enterprise (paragraph 15, *supra*) at this time was leased to The Northside Neighbor, Inc. by Community Press Company. In January of 1969, the name of The Sandy Springs Enterprise was changed to The Sandy Springs Neighbor.

19. On September 6, 1968 Times-Journal, Inc. and Rudy Martin purchased The West End Publishing Company which published a newspaper known as The Weekly Star. Immediately upon purchase this paper was divided into five papers, The Southside Neighbor, The West End Neighbor, The East Point Neighbor, The College Park Neighbor and The Hapeville Neighbor.

20. On January 16, 1969 North DeKalb Neighbors, Inc., a wholly owned subsidiary of Times-Journal, Inc., began publication of The Chamblee Neighbor and The Doraville Neighbor. In May of 1969 a third paper, The North Atlanta Neighbor, was added to this unit.

21. On April 30, 1970 Times-Journal began publication of the papers The Tucker Neighbor, The Stone Mountain Neighbor and The Clarkston Neighbor. Effective July 1, 1970 publication of all the aforenoted Neighbor papers, as hereinafter noted, was taken over by Neighbor Newspapers, Inc. At this time 22 newspapers were being published. On July 30, two new newspapers, The Vinings Neighbor and the Dunwoody Neighbor commenced publication bringing the total to 24. All are published at the plant of the Marietta Daily Journal and a single accounting department serves all the Times-Journal papers. For administrative purposes Media Printing Company, a division of Times-Journal, Inc. contracts with the Marietta Daily Journal and Neighbor Newspapers for all printing of office supplies and of the papers. Another division, Georgia Newspaper Credit Bureau, handles collections for all the papers. The Neighbor papers within each of the units hereinafter noted are generally identical except for the front and carry over pages. The Neighbor papers carry only "locally generated" news and local columnists. No syndicated material is published. Many of the featured columns and cartoons are carried by all the Neighbor papers.

Neighbor Newspapers, Inc.

22. The entity Neighbor Newspapers initially came into existence on July 1, 1969 as a joint venture of the aforenoted seven publishing entities and the East DeKalb Neighbors, Inc. all of which were controlled by Times-Journal, Inc. Neighbor Newspapers, Inc. was incorporated as of June 20, 1970 and as of July 1, 1970 took over the operations of these eight corporations which were thereafter dissolved. The officers, directors and stockholders of Neighbors Newspapers, Inc. are as follows:

Name	Office	Ownership interest (percent)
Otis Brumby	President and director	
Elisabeth D. Brumby	Vice president and director	
Mrs. George Foster	Secretary-treasurer	
Myrna Whitaker	Director	
Times-Journal, Inc.		76
M. William Kinney, Jr.		15
Judith Fowler		6
Rudy Martin		3

Operations of Times-Journal, Inc., and Neighbor Newspapers, Inc.

23. For operational and display advertising sales purposes the newspapers are divided into nine units. These units and the circulation figures for each paper are as follows:

Unit 1—Marietta Daily Journal (circulation: 21,687)—circulates primarily in Cobb County and south portions of Cherokee County.[2]

Unit 2—Roswell Neighbor (circulation: 2745); Alpharetta Neighbor (circulation: 1646)—circulate in northern portion of Fulton County.

Unit 3—Mableton Neighbor (circulation: 3095); Powder Springs Neighbor (circulation: 865); Austell Neighbor (circulation: 1539)—circulate in the southern portion of Cobb County, commonly referred to as "South Cobb County."

Unit 4—Kennesaw Neighbor (circulation: 1142); Ackworth Neighbor (circulation: 2046); Woodstock Neighbor (circulation: 832)—circulate in northern Cobb County (Kennesaw and Ackworth) and a portion of Cherokee County (Woodstock).

Unit 5—Northside Neighbor (circulation: 3910); Sandy Springs Neighbor (circulation: 3381)—circulate in the northside of Atlanta, in Sandy Springs which is in Fulton County north of the corporate limits of Atlanta and in unincorporated areas of Fulton County.

Unit 6—Smyrna Neighbor (circulation: 4100)—circulates in the Smyrna area of Cobb County.

Unit 7—Southside Neighbor (circulation: 4155); College Park Neighbor (circulation: 333); East Point Neighbor (circulation: 516); West End Neighbor (circulation: 823); Hapeville Neighbor (circulation: 221)—circulate primarily in Fulton County and portion of Dayton County.

Unit 8—North Atlanta Neighbor (circulation: 697); Chamblee Neighbor (circulation: 1426); Doraville Neighbor (circulation: 1042)—circulate primarily in De Kalb County in area commonly referred to as North De Kalb County.

Unit 9—Tucker Neighbor (circulation: 4800); Stone Mountain Neighbor (circulation: 4200); Clarkston Neighbor (circulation: 1100)—circulate in De Kalb County.

24. On July 30, 1970, as part of Unit 8, Times-Journal began publication of the Dunwoody Neighbor with an unpaid circulation of 3300 and as part of Unit 5 of the Vinings Neighbor with an unpaid circulation of 1100. The foregoing paid circulation figures total 66,301. A sampling figure of 71,500 is shown for total circulation prior to commencement of publication of the Dunwoody Neighbor and Vinings Neighbor.

25. Elisabeth D. Brumby, Brooks P. Smith, Robert D. Fowler and Mrs. Myrna Whitaker are not active in the operations of Times-

[2] The Marietta Daily Journal is also the legal organ for Cobb County.

Journal, Inc. or Neighbor Newspapers, Inc. other than to attend the annual Board of Directors meetings. As a practice they exercise no policy making powers and have no influence on the day-to-day operation of the newspapers. No offices are maintained by these individuals at Times-Journal. Otis A. Brumby, Jr. as president of both entities and head of their operations, hires the various department managers, sets their salaries, and is responsible for overseeing their activities. He also holds the position of publisher of the Marietta Daily Journal and is responsible for supervision of the new Times-Journal plant. As publisher, he is in charge of over-all operations of the Marietta Daily Journal.

26. There is disagreement among the witnesses as to the extent of Mr. Brumby's personal participation in and control over daily content of the newspapers. Two printers formerly employed by the Times-Journal testified his personal participation in composing room activities, including proofreading and change of editorial content, was extensive. Mr. Brumby and the Marietta Daily Journal production manager testified to the contra and in fact that under the papers union contract changes at this point would have to be ordered by the foreman. This conflict is of no consequence as Mr. Brumby testified that he is the operating head of the papers with the ultimate power of control of all content of the papers resting in him.

27. In the Neighbor newspaper organization, the executive editor, Mr. Randy Jay, has major responsibility for the operation of all 24 of the Neighbor papers. Mr. Jay is also charged with the responsibility, in his capacity as assistant to the publisher, of organizing the news department when a new paper is started by the Times-Journal organization. Each of the Neighbor units (paragraph 23, *supra*) has a separate executive editor who supervises the day-to-day operation of the unit and is responsible to Mr. Jay. In the case of the Smyrna Neighbor Mr. M. William Kinney also has the title of editor and publisher and handles advertising. Each unit has a news editor and various sports, society and women's editors who are responsible to the unit news editors. Some serve more than one unit where they are close together or contiguous, but basically each unit has its own staff. Hiring, salary and advancement of such personnel are under the jurisdiction of the executive editor. The executive editor of each unit meets regularly with the various unit editors to review their papers. The executive editor in turn meets with Mr. Brumby who holds the ultimate responsibility for the Neighbor papers operations. The executive editors and all editorial personnel serve without contract and may be discharged at will.

28. Mr. Rudy Martin is advertising director for all the papers and is directly responsible to Mr. Brumby. Each of the Neighbor units has an advertising editor and advertising manager who are responsible for retail advertising. A classified ad runs in all the Neighbor papers and is sold through the Marietta office. Mr. Martin holds meetings with the sales staff, trains new salesmen and supervises the activities of the individuals charged with the advertising responsibility for each unit. Classified advertising for all the papers is handled by one department manager.

29. Mr. Joe Kay is circulation manager of all the Neighbor papers and is directly responsible to Mr. Brumby. Mr. Kay promotes and develops circulation, supervises sampling programs in areas where the various newspapers have low subscriptions, and oversees newspaper labeling and mailing. He is assisted by an assistant circulation manager and various clerks.

30. Organizational structure of the Marietta Daily Journal is as follows: Mr. Brumby, president and publisher; Mr. Jay, assistant to the publisher, but devoting substantially all of his time to the Neighbor newspapers; Carrol Dadisman, editor, who is charged with the day-to-day responsibility for operating the paper; various news, women's and sports editors who are responsible to Mr. Dadisman; office manager; production manager; and circulation manager. There are also photographic and magazine departments.

Newspapers Competitive to Times-Journal's Newspapers

31. The only paper published in Cobb County that is competitive to the Times-Journal papers is the weekly Austell Enterprise, 2060 circulation. A weekly paper published in Woodstock (Cherokee County) has county-wide circulation. The weekly North DeKalb Record (20,000 circulation) and the weekly Northside News (10,000 circulation) compete with Unit 8 Neighbor papers in Chamblee, Doraville, Dunwoody and North Atlanta. The Neighbor papers in Unit 5, consisting of the Sandy Springs and Northside Neighbors, are in competition with the weekly Northside News (circulation 10,000). Unit 9, consisting of the Tucker, Stone Mountain and Clarkston Neighbors are in competition with two other area weekly newspapers, The Tucker Star and the DeKalb New Era. The Decatur-DeKalb News, a free advertising weekly is also distributed in this area. Unit 7, consisting of the Southside, College Park, East Point, West End and Hapeville Neighbors are in competition with the Atlanta Southside Sun, a free advertising weekly with a circulation of 37,594. The Atlanta Suburban Reporter circulates in East Point, College Park and Hapeville.

32. In all the communities in which the Times-Journal and Neighbor Newspapers circulate the dominant newspapers are the commonly controlled Atlanta Journal, an evening daily, and the Atlanta Constitution, a morning daily. On Sundays, the Journal and Constitution publish the combined Atlanta Journal-Constitution. The Audit Bureau of Circulation (ABC) Report for the 12 months ended September 30, 1969 shows the Constitution and Journal had adjusted daily circulations of 203,521 and 255,408, respectively, for a combined circulation of 458,929. The circulation of the combined Sunday edition was 542,224. In the five County Atlanta Standard Metropolitan Statistical Area the Constitution had a daily circulation of 144,185, the Journal a daily circulation of 198,767 and the combined Sunday edition a circulation of 314,276. In Cobb County the combined circulation weekdays was 31,409. Sunday circulation of the combined edition was 33,875. During the week of April 4, 1970, the Constitution had a circulation of 210,182 of which 1,510 was in Smyrna. The Journal's circulation was 260,782 of which 4,410 was in Smyrna. The combined Sunday Journal and Constitution had a circulation of 557,178 on Sunday, April 12,

1970, of which 6,240 was in Smyrna. In Smyrna, the Marietta Daily Journal has a circulation of approximately 4,000. Because of the Journal-Constitution circulation in the same area, the Marietta Daily Journal attempts to sell regional and national advertisers on the basis of it being a supplemental medium that will make their advertising campaigns more successful. The Times-Journal does receive some advertising from Atlanta stores, having outlets in both Atlanta and Cobb County. They never, however, use only the Marietta Daily Journal and not the Atlanta papers.

33. There are three additional daily papers published in the Atlanta metropolitan area. These are the Fulton County Daily Report, a specialized paper for publication of Fulton County legal notices (circulation 6,525); the Gwinnett Daily News, published in Lawrenceville, Georgia (circulation 6,200); and the Atlanta Daily World, published five days a week, Tuesday through Saturday (circulation 22,000). Other weekly papers published in this area include the Clayton County Journal, The Lithonia Observer, Weekly Advertiser of McDonough and the Fayette County News. In combination with the DeKalb New Era and Atlanta Suburban Reporter (paragraph 31, *supra*) all of which are published under the name of Suburban Newspapers of Atlanta, Inc.[3] total circulation is 39,607. The other independent weekly newspapers published in the five county Atlanta Standard Metropolitan Statistical Area are The Southern Israelite (Fulton County), circulation 4,750; The Buford Advertiser and News of Gwinnett (Gwinnett County), total circulation 2,474; The South Fulton Recorder (Fulton County), circulation 3,000; The Forest Park Free Press and Clayton County News and Farmer and Forest Park News (Clayton County), total circulation 8,000; The DeKalb Tribune (DeKalb County), circulation 20,000; and Glenwood Hills News (DeKalb County), circulation not available.

Editorial Policies of Times-Journal, Inc.-Neighbor Newspapers, Inc.

34. Mr. Dadisman, editor of the Marietta Daily Journal, is in charge of writing its editorials and writes at least 95% of the local editorials. He is free to write them as he wishes and is not required to clear them with Mr. Brumby. He does on occasion, however, discuss them with him when he feels Mr. Brumby can be helpful by providing information or in formulating a position. For the latter purpose he also on occasions discusses them with some of the reporters and city editor for their opinions or background data. On one occasion Mr. Brumby asked Mr. Dadisman to hold up a completed editorial so that it could be discussed further. This involved a Marietta city employee appointee and the editorial was not run because of background information Mr. Brumby provided which caused Mr. Dadisman to change his opinion on the matter. The judgment not to run it was Mr. Dadisman's. Occasionally a Daily Journal reporter will write a local editorial and some national editorials from an editorial research service to which the paper subscribes are also run on occasion. In the last three years Mr. Brumby has written no editorials

[3] Suburban Newspapers of Atlanta, Inc., is a trade association of weekly newspapers and are sold as a group or suburban package.

for the Daily Journal. (See also paragraph 26, *supra.*) The Daily Journal does endorse political candidates.

35. Editorial policy within the Neighbor groups is basically the responsibility of the various unit news editors. Some of the news editors, however, are young and inexperienced and as a consequence a number of Neighbor papers editorials are written by the unit's executive editor. Most of the papers carry only one or two local editorials per week and about 50% of them are written by news editors in the field. Mr. Kinney handles editorial policy and writes the editorials for the Smyrna Neighbor. Neighbor papers editorials normally are of a noncontroversial nature contrasted to those of the Marietta Daily Journal which are on "Weightier subjects." There is no requirement that editorials written by news editors be submitted for prior review. The Neighbor papers carry both signed and unsigned editorials and the same editorial appears in all of the papers in a unit. On occasion some Neighbor papers take different editorial positions. On other occasions the same editorial appears in more than one unit. In some instances the Daily Journal and Smyrna Neighbor have taken opposing editorial positions. The executive editor and the news editors have responsibility in determining the inclusion of "letters to the editor" in the Neighbor papers. The number received, however, are too few to permit designating a certain area on the editorial page for their publication. The editors of the Neighbor paper are free to endorse candidates they support, but seldom do. Mr. Kinney has endorsed candidates and has differed from the candidate endorsed by the Daily Journal.

36. The manner in which Times-Journal newspapers have covered certain local news events and one instance of a political endorsement and news story are matters of record. During the 1968 Superior Court judgeship election campaign, the Marietta Daily Journal, approximately one week before the election, endorsed one Robert Howard over Howell C. Ravan. Mr. Howard had performed various legal services for Times-Journal, some relating to the instant litigation. The editor of the Times-Journal was aware of these services, but testified that he "was endorsing Mr. Howard on the basis of what I knew of him as a legislator and as a lawyer. . . ." One Timothy Spake, six or seven months before the election, had been killed in an illegal drag race causing the subject to become "a very hot issue" throughout the County at that time. Approximately three weeks before the election the Marietta Daily Journal ran as news items stories which related to various sentences handed down in drag racing cases by candidate Ravan during his tenure as misdemeanor court judge. While no critical comment had been made by the Daily Journal at the time of the sentences several months earlier, they were critical of the decision at this time. On the day immediately preceding the election the Daily Journal ran a front page story which included derogatory statements about candidate Ravan made in a speech by the Cobb County district attorney who also was supporting Mr. Howard's candidacy.

37. A second local community matter of record concerned the contract cancellation of the principal of Hawthorne High School in Smyrna. The contract of the principal of this school was not renewed

after almost eighteen years of service in the Cobb County school system. He was offered a grammar school teaching position. A group of citizens, principally parents of children in this school, sought his reappointment. Meetings were held with the Smyrna representative to the Cobb County School Board on May 1, 1970 and on May 8, 1970 with the County School Superintendent to determine the reason for the failure to renew this contract. An answer satisfactory to the group was not received and on May 18, 1970 some attended a regular meeting of the School Board to hear a reading of the minutes of the previous meeting to determine the cause for the failure to renew the contract. During the morning session reading of the minutes for this action was "skipped" and again in the afternoon session until the group's representative present had left at approximately 2:40 p.m. She returned at 4:00 p.m. and was thereafter informed the minutes for this action had been read during her absence. A Marietta Journal reporter was present at this meeting, but the group's representative failed to contact him at conclusion of the meeting so went immediately to the Marietta Journal offices and sought unsuccessfully to get news coverage of the matter. On May 28, 1970 a protest meeting was held at the Smyrna City Hall concerning the matter which was attended by 50 to 60 people, the mayor of Smyrna and one councilman. The meeting was covered by a Station WBIE reporter, but the Smyrna area representative on the School Board refused to answer questions until the reporter's recorder had been turned off. News coverage of this impromptu meeting was not requested of the Marietta Daily Journal because of the prior experience following the May 18, 1970 meeting.

38. There was no news coverage given by either the Marietta Daily Journal or Smyrna Neighbor until June 10, 1970 when the concluding four paragraphs of an article in the Daily Journal headed "Board Acts on Budget" discussed a petition which the citizens' group was preparing in an effort to have the principal reinstated. The editor of the Daily Journal testified that he was unaware of the extent of this controversy until a paid "open letter" ad was run in the Daily Journal on June 14, 1970. He also testified on June 15, 1970 that a woman called him, approximately two to three weeks ago, not just about the Hawthorne School, but about several changes in Smyrna that a number of people were upset about. The paper had run a story on the changes in principals for all the schools which listed the changes. The editor of the Smyrna Neighbor testified that he received a 30-minute phone call about this matter on June 2, 1970 requesting that the paper cover the County School Board meeting the next morning.[4] He advised the caller to contact the Marietta Daily Journal as the Smyrna Neighbor had no staff of reporters and moreover that the information came too late for the June 3rd edition. Coverage was given this controversy in the June 17, 1970 edition of the Smyrna Neighbor. Legal counsel for the Cobb County School Board, the body responsible for terminating the principal's contract, is Harold Willingham. Mr. Willingham is also the corporate attorney for Times-

[4] The witness later testified the School Board meeting was on June 10, 1970 which, if correct, would place the call on June 9, 1970 rather than June 2, 1970.

Journal, Inc. and will be a member of the board of directors of Jonquil Broadcasting Company if this transfer is approved. There is, however, no record evidence indicating that these circumstances influenced news coverage of this matter by either paper.

Newspaper Advertising Policies and Revenues

39. Because of production costs display advertising in the Times-Journal papers is sold only by units. There is no requirement that more than one unit be purchased. Classified advertising may only be purchased in the entire Neighbor chain; all such advertising is handled in the central offices of Times-Journal. It cannot be placed in the local Neighbor offices. There is no requirement that the ad also be placed in the Marietta Daily Journal. Discounts are given when display advertising is purchased in more than one unit. The discount varies with the number of units purchased from 20% for the purchase of two units to 52½% for the purchase of all nine units.[5] Advertising for one unit may be placed with salesmen for any other unit. There is no mandatory combination purchase of the Daily Journal or Neighbor newspapers and from 60 to 75% of the display ads are placed in only one unit.

40. Including advertising budgets of all chain stores with Smyrna outlets and their expenditures for all forms of advertising in the Atlanta SMSA four to five percent of such expenditures are for advertising in the Times-Journal newspapers. Based on commercial advertising accounts billed May 1, 1970, the Marietta Daily Journal and Neighbor newspapers derived 44.4% of their advertising revenues from Marietta Georgia; 32.8% from Atlanta, Georgia; and 5.8% from Smyrna, Georgia. Approximately 54% of total revenues came from Cobb County advertisers. Of the 714 business licenses issued by the city of Smyrna in 1970 (paragraph 41, *infra*) 377 are Smyrna only businesses, 170 are multiple outlet or chain stores doing business in Smyrna, and 167 had unknown ownership structures. Of the Smyrna only stores listed, advertising was placed as follows in the Times-Journal papers:

	Smyrna Neighbor (percent)	Marietta Daily Journal (percent)
No advertising	297—78.8	273—72.5
Advertising in 10 percent or more editions	10— 2.7	15— 3.9
Advertising in 1 to 9 percent of editions	70—18.5	89—23.6

Of the multiple outlet stores listed advertising was placed as follows:

	Smyrna Neighbor (percent)	Marietta Daily Journal (percent)
No advertising	109—64.2	71—41.8
Advertising in 10 percent or more editions	30—17.6	28—16.4
Advertising in 1 to 9 percent of editions	31—18.2	71—41.8

[5] See paragraph 23, *supra*, for a listing of the nine units.

Smyrna and Environs

41. Smyrna, Georgia is located in Cobb County with the center of the city being 17 miles from the center of Atlanta. At the closest point the cities are 1.9 miles apart. Current population is 19,027 persons, an increase of approximately 9,000 since the 1960 Census. Smyrna has a mayor-council form of government, its own fire and police departments, public library, post office and city operated sewage system. Water is supplied by the Cobb-Marietta water authority. The city also has separate recreational, charitable, civic, cultural, social and religious groups and organizations. Smyrna is part of the Cobb County school district which has 69 elementary and secondary schools. A technical school, a junior college and a four-year college are also located in Cobb County. Seven hundred and fourteen business licenses were issued by the city government for the year 1970. These include professional licenses, the number of which cannot be determined from the record. They also include licenses for firms doing business in Smyrna, but having no Smyrna outlet. There is little heavy industry in Smyrna.

42. Cobb County, which includes both Smyrna and Marietta, has approximately 60,000 dwelling units, a population of 196,616 persons (1970 Census), annual retail sales of $448,312,000, 183 industrial plants, 30 major shopping centers, 2 hospitals and various clinics, library system, Chamber of Commerce and the aforenoted educational facilities. Marietta is the county seat and has a current population of 28,335 persons. At the closest points it is six miles from the city of Atlanta and slightly over two miles from the city of Smyrna. The Chattahoochee River is the dividing line between Fulton and Cobb Counties and between Atlanta and Cobb County. Cobb County and Smyrna governmental officials have sought to maintain separate identities, *vis a vis*, the city of Atlanta. By unanimous resolution the mayor and city council of Smyrna on June 1, 1970 condemned an encroachment by the Atlanta post office into an area 50 feet from the Smyrna city limits, but 15 miles from the Atlanta post office. A state constitutional amendment making it mandatory for the residents of Cobb County to approve by vote annexation of any part by a city was defeated as it had to pass in every municipality in the state. Legislation was then "sneaked through" creating the municipality of Chattahoochee Estates, Georgia and having city limits 8 miles long and 10 feet wide to form a buffer between Atlanta and Cobb County. Georgia law prohibits annexation by one municipality across another municipality and this 8-mile strip extends the entire distance of the common border of Atlanta and Cobb County. A metropolitan type government has been discussed which would include the entire Atlanta metropolitan area, but has never progressed beyond the "talking stages." Cobb County is a member of the Metropolitan Atlanta Regional Planning Commission which is supported by the county governments of Cobb, Clayton, DeKalb, Fulton (which includes Atlanta) and Gwinnett Counties. These five counties also make up Metropol, a planning agency for all police departments in this five county area and MACLOG, a health agency for this five county area.

Existing Communications Mass Media

43. Times-Journal made a study of the most recently filed renewal applications of the broadcast stations providing service to the city of Smyrna. This study was to show the responses to the inquiry as to the area the station principally undertakes to serve and the percentage of news programs to be devoted to local and regional news. Of the 14 Atlanta aural stations five specified the five county SMSA, four the Atlanta metropolitan area, one Atlanta metropolitan area-adult portion, two Atlanta and surrounding area and one the black citizens as their principal service objectives. One station did not respond to the question. Percent of news to be devoted to local news by standard broadcast stations varied from 40 to 75%. Three of the five FM stations proposed similar percentages. One Marietta station responded it principally undertakes to serve Marietta, Smyrna and Cobb County with 35% of news being local and regional. A North Atlanta station listed Cobb County problems and three Smyrna interviews in its survey of community needs. Though its studios are located in Atlanta, Station WQXI-FM is licensed to Smyrna. It shows as the principal area it attempts to serve to be Smyrna and the five county Atlanta metropolitan area. The five Atlanta commercial television stations all show the five county SMSA as the area they primarily propose to serve. The percent of news programs to be devoted to local and regional news varied from 34 to 61%.

44. Times-Journal also served written interrogatories on 27 broadcast stations and a CATV system providing recognized service to Smyrna and received responses from all except four stations WAOK Atlanta, educational stations WABE-FM and WETV-TV Atlanta and WTJH Eastpoint. The CATV system advised that as of January 1, 1970 it had discontinued all local program activity. Interrogatories were also served on 23 newspapers in the Atlanta area, but only three—Atlanta Constitution, Atlanta Journal and Gwinnett Daily News—responded. Purpose was to determine whether Smyrna and its environs were included in the area the stations and newspapers principally undertake to serve and the extent of service given, if any, designed to meet the local needs of Smyrna. Information was sought specifically with reference to news coverage and service to local Smyrna groups and organizations.

45. The interrogatories show that most of the Atlanta stations principally undertake to serve the five county Atlanta SMSA which includes all of Cobb County. Five Stations (WLTA-FM, WKLS-FM, WGUN, WATL-TV, and WSB-TV) and one newspaper (Gwinnett Daily News) devote none of their local news time or space to strictly Smyrna local news. The remaining stations and newspapers provided some local Smyrna news but were unable to determine the amount of time or space devoted to it (WPLO-AM-FM, WQXI-AM-FM-TV, WJRJ-TV) or devoted the following times: WIIN—5%, WRNG—less than 1%, WGKA-AM-FM—3%, WGST—less than 2%. WERD—less than ½%, WBIE-AM-FM—2-4% [6], WFOM—15 to 20% of Cobb County news [total time devoted to Cobb County news not given], Atlanta Journal—less than 2% and the Atlanta Constitution—about ½ of 1%. At least six of the broad-

[6] WAGA-TV reported 2% for the period February 24, 1970 through March 9, 1970, but that this percentage was abnormally high because of the Lockheed controversy.

cast stations devoting time to local Smyrna news did so only if such news held regional or metropolitan area interest. Stations WBIE–AM and FM cover local Smyrna news by use of a "stringer", others depend on station reporters. Stations WSB–AM–FM–TV, WRNG, WGKA, WAM, WBRD, WKLS, WGUN, and WJRJ–TV and the newspaper Gwinnett Daily News use no specific sources for local Smyrna news. Four of the stations (WKLS, WATL–TV, WAGA–TV, WJRJ–TV) had carried no public service announcements for Smyrna groups and organizations. The remaining stations either had carried announcements, some on a regular basis, or stated that they would if asked. None of the stations carried any broadcasts on behalf of churches or religious organizations located in Smyrna. Three of the stations (WSB–AM–FM–TV) had carried broadcasts concerning Smyrna education and schools. The others except WIIN and WATL–TV had announcements of school closings. None of the stations had presented public affairs programs within the last six months which dealt with topics of interest to Smyrna only. None of the stations or newspapers, within the past six months, had presented editorials relating to affairs in Smyrna only.[7] None of the stations or newspapers carried political broadcasts or advertisements by or on the behalf of candidates for local office on Smyrna during the last local election campaign. WQXI–AM & FM did announce the election results. Three of the stations (WFOM, WBIE–FM, WSB–FM) broadcast sporting events originating in Smyrna, or events involving Smyrna teams. None of the stations presented local program originations from Smyrna. Ten of the stations (WPLO–AM & FM, WIIN, WFOM, WBIE–AM & FM, WQXI–AM–FM–TV, WJRJ–TV) and the Atlanta Journal and Atlanta Constitution newspapers solicit local advertising in Smyrna.

46. Transferees have indicated that Atlanta media fail to adequately serve the specific needs of Smyrna and Cobb County. Thus, transferees represent in their application:

> Station WYNX is the only station located in Smyrna, Georgia and one of the few stations located in Cobb County. No other station in Cobb County devotes extensive time to the coverage of local news and community affairs. It is believed that this station will provide a service to Cobb County which is not provided by any other station serving this area. Although numerous stations in Atlanta provide a radio signal to Smyrna and Cobb County, none of these stations has a program format which is actually designed to serve the specific needs of Smyrna and Cobb County.

Patterns of Ownership of Other Mass Media in the Atlanta, Ga., Area

47. The owners of the Atlanta Journal and Constitution also own two radio Stations WSB–AM/FM and VHF television Station WSB–TV in Atlanta and newspaper, CATV and broadcast interests in other cities. Atlanta VHF Station WAGA–TV is licensed to the Storer Broadcasting complex which owns radio and television stations in other metropolitan areas and numerous CATV systems. The third Atlanta VHF Station WQXI–TV is licensed to Pacific & Southern Broadcasting Company, Inc., which is also the licensee of WQXI

[7] Eight of the stations did not broadcast editorials.

Atlanta and WQXI–FM Smyrna. Pacific & Southern also owns Stations WSAI, WSAI–FM in Cincinnati, Ohio and Stations KHON–TV, KAII–TV and KHAW–TV, all in Hawaii. The permittee of Station WATL–TV (Channel 36) Atlanta is owned by U.S. Communications Corporation, which also owns television stations in four other communities. Christian Broadcasting Network, Inc., the permittee of non-operational Station WHAE–TV (Channel 46), owns a TV–FM combination in Portsmouth, Virginia and five FM stations in New York State.

Public Witnesses

48. Various Smyrna residents and businessmen expressed an interest in the proceeding and did testify in opposition to the proposed transfer of control. *James R. Askea*, an electrical contractor and resident of Smyrna expressed his concern with the acquisition of Station WYNX by the newspaper which controls most of the media in the local area, i.e., Smyrna, Marietta and Cobb County. Advertising of his business is now principally through general promotion of electrical installations through coop advertising. He does a minimum amount of advertising at present, but regularly used the Smyrna Neighbor, Marietta Journal and Station WFOM Marietta, Georgia while building his business.[8] The bulk of his business is done in the Atlanta metropolitan area, but he seeks to limit service calls to the Cobb County area. Basically his opposition to the transfer is that he is opposed to one group or one person acquiring control over a number of media.

49. *O. C. Hubert* lives in Marietta and is a real estate broker. He indicated his opposition to one publisher's control of the news media in Cobb County. Mr. Hubert, who has been active in politics in the area, having run unsuccessfully for several offices, was of the view that the Times-Journal papers should not endorse candidates and that in several instances his position on issues had been unfairly presented. He opposes the endorsement of candidates as it is his belief that many Cobb County area political offices go uncontested at election time because it is known that the Times-Journal newspaper supports a particular candidate and consequently others refuse to run feeling they "just don't stand a chance." It is also Mr. Hubert's belief that the only advertising media which can successfully be used by Cobb County candidates are the Cobb County newspapers controlled by Times-Journal, Inc. Times-Journal newspapers have accepted political advertising from Mr. Hubert in the past and have printed his "letters to the editor."

50. *Melvin Britt* lives in Atlanta, Georgia and is sheet metal representative for local 85 of the Sheet Metal Worker's International Association. Mr. Britt stated that various Cobb County residents among this local's members have expressed their concern that the transfer of Station WYNX would result in a media monopoly in Smyrna and its surrounding area. He had no personal knowledge of the ownership of mass communications media in Cobb County, did

[8] Business volume now is substantial and such that Mr. Askea testified that he does not now need advertising except for employees. He uses both the Marietta and Atlanta papers for this purpose.

not subscribe to the Marietta Daily Journal and did not often listen to Station WYNX.

51. *Donald Howard* resides in and is owner of a music instruments store in Smyrna. He places some classified ads in the Neighbor papers and advertises extensively over the facilities of Station WYNX. One area of concern was his belief that the proposed change of basic format from country and western music to standard popular music would initially cause a substantial loss of station audiences with adverse consequences to his advertising. He presently advertises on nine radio stations all having country and western formats or at least one-half country and western format. It is Mr. Howard's belief that the acquisition of Station WYNX by the newspapers would create a monopoly similar to ones he is familiar with in the music industry. He noted that in this area the small newspapers are tied together, they in turn are tied together with the Marietta Daily Journal and to add Station WYNX would in his view create a monopoly. Mr. Howard knew of no occasion where Times-Journal newspaper had printed a deliberate untruth or discriminated against anyone, but testified that though he subscribes to both he never has time to read them. His concern is the potential danger in a concentration of control over this media. He considers Smyrna to have a separate identity from Atlanta.

52. *Arthur M. Gnann* lives in Morrow, Georgia and is president of the Atlanta Typographical Union. In 1969 his union was involved in a labor dispute with Times-Journal, Inc. Mr. Gnann testified that during the labor dispute the union had difficulty in making its position known through local media. As the union did not desire to pay for advertising in Times-Journal newspapers, its access to media was limited. To present the union's side it had "thousands upon thousands" of hand bills printed and distributed to the public to give the union's side, but felt this was ineffective. Paid announcements were broadcast by Station WYNX without change. Mr. Gnann is concerned that if the transfer is approved it will add to Mr. Brumby's ownership of news media in the area and that his ownership is spreading "all the time." It is his belief that this is detrimental to the community.

53. *James Freeman* lives in Marietta and is a truck dealer. He is concerned about the centralized control of news and advertising in the Smyrna-Marietta area by Times-Journal. He also opposes the transfer from a cost standpoint as he considers WYNX to presently be the best advertising value available in the Atlanta area. It is his belief that if acquired by Times-Journal it will have to equalize the buy from a cost standpoint between the station and the Times-Journal newspapers.

54. *Austin D. Graham*, secretary-treasurer for Local Lodge 709 representing Lockheed employees, opposes the transfer from the standpoint of permitting a single entity to "tie up the entire news service of a county . . . ." It is his view that this can lead to an unhealthy situation through dominance of circulation and advertising and through political corruption "if the integrity of the publisher is questionable."

Operation of Station WBLJ

55. *Mr. Werner Wortsman* is wholly responsible for the day-to-day operation of Station WBLJ Dalton, Georgia. He assumed this position

January 1, 1960. Prior to that time he was employed as advertising manager of the Marietta Times-Journal.[9] (See paragraph 4, *supra.*) Dalton, which is approximately 75 to 80 miles north of Marietta, Georgia, reports no circulation of Times-Journal newspapers. Some of the four principals of Times-Journal with ownership interests in Station WBLJ do attend 45 minutes board of directors meetings once a year, but never visit the station or communicate with the station other than to receive monthly financial statements. They exercise no day-to-day control over news decision, editorial content or economic matters. Mr. Wortsman hires all station personnel, and supervises all aspects of station operation. There are no joint employees between Station WBLJ and the Times-Journal newspapers. Nor is there an exchange of news between the station and the newspapers. The station has a reporter from the Dalton newspaper (a non Times-Journal publication) on a "small" retainer who furnishes news leads to the station and the station in turn supplies news leads to the reporter. Station WBLJ rarely editorializes, does not endorse candidates and has never advertised in any media owned by Times-Journal. The station's facilities are made available for the presentation of both sides of controversial issues.

The Proposed Operation of Station WYNX

56. Under the operation proposed by transferees the entire Station WYNX operation would be independent of any operating connection, control or influence from the newspapers owned by Times-Journal and would compete with the Smyrna Neighbor for news; there would be no combination selling or discounts for advertising on the station and in the newspapers; the news staff of the station would be separate from that of the newspapers; station air time would not be sold by newspaper advertising salesmen; the editorial independence of the station would be preserved; and, with the possible exception of a remote studio at the new Times-Journal building, the station would occupy separate facilities from the newspapers. Radio program logs are not now published by the Times-Journal newspapers. In the event, however, that Station WYNX logs are carried a similar service would be furnished to the other local stations. Station WYNX presently utilizes the services of two employees who devote approximately 50% of their time to the news operation. Transferees propose to budget a minimum of $25,000 a year to develop the station's news operations particularly as to local Smyrna and Cobb County news. It is anticipated that there would be a separate news staff of not less than four people and the station would also continue the present UPI news wire service. If the Times-Journal newspapers are advertised on the station, the newspapers would be billed in the regular manner and at regular rates.

57. The general manager would have responsibility for day-to-day operation of that station. Mr. Brumby would hold ultimate authority in the station's operations and would hire the general manager. Neither he nor Mr. Kinney, however, would participate directly in day-to-day operations. Station editorials, if any, would be determined

[9] Mr. Wortsman initially held a 20% interest in the licensee corporation. He subsequently acquired an additional 20% interest.

by the general manager and the news director. The news editor would determine the news that the station would carry and Mr. Brumby would not review his decisions prior to air time. Corporate guide lines would, however, be established within which the general manager would have to work and Mr. Brumby would discuss matters of broad station policy with him. The general manager would initially also establish the station's rate card and consideration has not yet been given to a rate structure. Cost of news programming is the only item given budget consideration and it is proposed to substantially increase news costs. No study has been made by the transferee of available or estimated revenues. A return on investment at least equal to that which could be earned on bond investments is anticipated. Based on transferee's knowledge of the economics of this market and the assumption of an efficient sales department and station operation, transferee believes the station can make a profit.

58. Transferees rely on a stated intent to expand local programming to support the required conclusion that the transfer would serve the public interest. It is proposed to obtain at a cost of approximately $2000 mobile and related equipment for remote program origination to permit "expanding the level of local programming." This primarily would relate to news programs, but also includes the two hours per week to be devoted to public affairs and the three hours proposed for all other programs exclusive of entertainment and sports. The technical operation is proposed to be improved by employment of the holder of a first-class operator license to serve as chief engineer. All equipment recommended by transferee's consulting engineers for replacement would be replaced. Maintenance of an "effective level" of spare parts is also proposed. There is no proposal, however, for an auxiliary power supply or transmitter nor is there evidence as to what would otherwise make up this "effective level." The aforenoted news staff would be employed with 11¾ hours per week (14% of total broadcast time) to be devoted to news programs. Basic format would apparently be changed from country and western to standard popular music.[10]

Present Operation of Station WYNX

59. Stated area which Station WYNX principally undertakes to serve is Cobb County with special emphasis on Smyrna, Marietta seat of the County, and the area known as "South Cobb County." (Mabelton, Powder Springs and Austell) Station WYNX during the 1969 composite week devoted 11 hours 39 minutes to news programs and proposed for the renewal period of 11½ hours per week of news programming. Local Smyrna and Cobb County newscasts are broadcast Monday through Friday at 7:30, 8:00 and 8:30 a.m.: at 12 o'clock noon: and at 3:30, 4:00, 4:30, 5:00 and 5:30 p.m.[11] Each has five minutes of news plus a one-minute interior commercial. Local and regional news make up approximately 50% of total news broadcast. Georgia and

[10] Mr. Brumby testified that "We indicated in our application we would not change the format, it's town and country." T–136, 137 Section IV–A, page 3, paragraph 17, however, proposes a format of "Standard Popular Music—100%." At T–168 he testified that the application as originally filed remains transferee's program proposal.

[11] Mr. Polk gave a total figure of 40 Smyrna and Cobb County newscasts per week, but then listed for Monday through Friday nine such newscasts daily. Subsequently a figure of eight per day was also given from T–1216.

national news are from the UPI wire service. Station WYNX does not presently have mobile facilities but does originate remote programs by leased telephone lines. For the year 1970 82% of its advertising accounts were from the Marietta-Smyrna trade area, 12% were from "South Cobb County" (see above), 7% were through Atlanta advertising agencies though no accounts were out of Atlanta as such and one account in Roswell. The station competes for business only within the Smyrna-Marietta area and considers its competition to be Stations WFOM–FM and WBIE, both located in Marietta and the Smyrna Neighbor and Marietta Daily Journal newspapers. Atlanta businesses are not considered to be potential advertisers. Station WYNX has available the services of a first-class engineer who inspects the station daily and performs required maintenance services. Mr. Polk also holds a first-class radio-telephone operator license. A supply of spare parts, particularly tubes, is maintained. The station does not have an auxiliary power supply and has gone off the air due to power failure, at other times due to telephone line trouble or transmitter trouble. On one occasion because of the failure of a modulation transformer it was off the air for a period of 4½ days. This is a major piece of equipment and because of weight shipping problems were encountered which delayed delivery by air freight of a replacement transformer. Locally originated programs include a 30-minute program each Tuesday at 2:30 p.m. "Community Forum" which follows a "Meet the Press" format. Civic and community leaders are interviewed on this program on topics of interest to Smyrna and the Cobb County area. It has been broadcast for approximately the past three years. A daily "Man on the Street" program is broadcast from the Cobb County Shopping Center, the largest shopping center in Smyrna, at 11:00 to 11:30 a.m. on which local citizens are interviewed concerning topics of local interest. The program originates by remote telephone line.

CONCLUSIONS

60. A principal area of dispute in this proceeding is the meaning to be attached under the wording of issue (a) to "Smyrna, Georgia and environs." Transferee's position is that the "Atlanta Standard Metropolitan Statistical Area is the relevant area to be considered in examining this complex concentration issue." The position of the Broadcast Bureau is that "we do not here seek to determine whether one group controls the mass media in the major market of Atlanta, Georgia. 'Smyrna and environs' must be construed as something less than the Greater Atlanta area and something more than the city limits of Smyrna. . . ." and the most satisfactory meaning must be "an area which includes both Smyrna and Marietta, Georgia and various other areas within Cobb County, Georgia." The Commission, however, twice made clear its area of concern and issue (a) must be read in the light of the expressed area of concern.

61. The order of designation recognizes that the residents of Smyrna receive newspaper and broadcast service from multiple media located in Atlanta, Georgia. The expressed area of concern is the extent of coverage rendered to Smyrna, Georgia affairs by the Atlanta news media and whether, in the light of such service, a grant of the instant

application would cause an undue concentration of control of local mass media in Smyrna and environs in a manner inconsistent with Section 73.35 [12] of the Commission's Rules. Coverage by media from other nearby communities is also relevant. This area of concern was defined following detailing of the facts that transferees control the only newspaper in Smyrna, the only daily newspaper in Marietta which is nearly adjacent to Smyrna, a number of other neighborhood weeklies in the area and have ownership interests in Station WBLJ Dalton, Georgia, a community "about 60 miles from Smyrna," all being facts relevant to Section 73.35(b). The only expressed fact relevant to Section 73.35(a) is that of ownership of Station WBLJ and the record establishes that there is no violation of this section as there is a 24 mile separation between the 1 mv/m groundwave contours of Stations WYNX and WBLJ. Control of this station remains, however, a factor to be weighed under Section 73.35(b).

62. The fact of ownership of the newspaper entities specified in the order of designation does not in and of itself constitute an absolute bar to grant under the Commission's Rules as presently constituted, though such ownership is now the subject of a rulemaking proceeding which may lead to such prohibition. See *Further Notice of Proposed Rulemaking in Docket No. 18110* 22 F.C.C. 2d 339. It was by its action denying the Petition for Special Relief and Immediate Grant of Application submitted by transferees following issuance of this further notice that the Commission again expressed its area of concern herein. Transferees sought reconsideration of the designation order and a grant of the transfer application without hearing "subject to and conditioned upon the outcome of the pending newspaper rulemaking in Docket 18110." By order released June 1, 1970 the Commission denied the relief sought stating the pendency of the rulemaking proceeding in which adoption of new policies is under consideration provides no basis for deleting a concentration of control issue from an adjudicatory proceeding where the factual allegations indicate the existence of substantial public interest questions and moreover, no showing had been made of the extent to which Smyrna affairs receive coverage from Atlanta newspaper and broadcast services—a question which is crucial to making the requisite finding that the public interest will be served by a grant of the transfer application. Thus the crucial area of consideration as encompassed within section 73.35(b) of the Rules has twice been defined by the Commission. And as defined, transferees are in error in urging that there simply cannot be any local concentration of mass media control where a minimum of 30 other mass media in the metropolitan area are available to a city which is an integral part of that metropolis, and with each one pro-

[12] Section 73.35 of the Rules provides in pertinent part as follows: No license for a standard broadcast station shall be granted to any party (including all parties under common control) if: (a) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations computed in accordance with § 73.183 or § 73.186; . . . (b) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question . . . .

viding some degree of service to that city. It is the suburban community of Smyrna and its surrounding environs in which Times-Journal, Inc. owns mass media which are encompassed within the expressed area of concern, not Atlanta or the Atlanta Standard Metropolitan Statistical Area. This is in full accord with Commission policy. By its *Policy Statement on Section 307(b)* 2 F.C.C. 2d 190, the Commission gives formal recognition to the need of such suburban communities for a local transmission service. At the time of designation the Commission was fully aware of the multiplicity of media located in Atlanta. Its expressed concern is with the suburban community of Smyrna and its environs, not the Atlanta Standard Metropolitan Statistical Area in its entirety. The only concern as to Atlanta or the Atlanta SMSA is the extent that media located therein serve the local needs of this suburban community, i.e., whether such media is in fact sufficiently service oriented toward this suburban area and competitive with the Times-Journal media to negate the adverse public interest considerations inherent in the concentration of control over local media by Times-Journal, particularly if Station WYNX also comes under its control.

63. Turning to the evidence of record, that Smyrna fully meets the Commission's concept of a suburban community with surrounding districts or environs having identifiable separate needs from those of the entire metropolitan area is established. No part of Cobb County is a part of the Atlanta urbanized area though a part of the Standard Metropolitan Statistical Area. Smyrna, Marietta and Cobb County have maintained separate political identities from the city of Atlanta and insofar as is shown by this record, the common interests of these three political entities are much more closely allied one to the other than to the city of Atlanta. Voluntary cooperation is shown between the five county SMSA which does include Cobb County, Smyrna and the city of Atlanta. The indicia of separate identity, of separate needs and interests and the desire of Cobb County and Smyrna to maintain identities separate from that of Atlanta, however, are substantially greater than the indicia of sameness. The election for Superior Court judge in which the Marietta Daily Journal played a prominent part (paragraph 36, *supra*) had local overtures only and there is no showing that Atlanta or other media played any part in this election. The public school matter (paragraphs 37 and 38, *supra*) involved only the city of Smyrna. That Smyrna and Cobb County are much more than the bedroom communities to the city of Atlanta they are asserted by transferees to be, is amply demonstrated by the findings of fact set forth in paragraphs 41 and 42, *supra*. It would serve no useful purpose to here repeat the numerous factors there noted.

64. Operation by the present sole stockholder for the past five years has been as a suburban community station. Though both the 5 mv/m contour and 2 mv/m contour of Station WYNX encompass substantial portions of the area of the city of Atlanta, no effort is or has been made to serve the transmission needs of that city. Its service concept in public affairs programming is Smyrna-Marietta and Cobb County and virtually all its revenues are derived from those areas. Though a sales brochure was once prepared to be used in seeking national accounts there is no record indication that Station WYNX tends to seek

out national and regional advertisers or to identify itself with the Atlanta metropolitan area rather than with the particular needs of Smyrna, its specified community. (*Policy Statement on Section 307(b), supra.*)

65. The degrees of technical and programming services provided by the various other stations to the area of concern are detailed in the findings of fact. A plethora of reception services are shown, a circumstance normal to suburban communities in areas near major cities. From a transmission standpoint, however, program service has been minimal being limited to some attention to local Smyrna news, sports events and public service announcements. A complete absence of attention to Smyrna public affairs, political broadcasts and local program originations is shown. (Paragraph 45, *supra.*) Of the 23 newspapers served with interrogatories to assess the service provided Smyrna, only three replied. Of these three one responded none, the others some space, the exact amount being unascertainable. Of the public witnesses testifying herein, none had turned to media other than that controlled by transferees or Station WYNX for coverage. This includes the Superior Court judgeship election, the Hawthorne School matter, the advertising of local businesses or other advertising. All public witnesses opposed the proposed transfer because of the "monopoly" or concentration of control over local media position now held by transferees.

66. News media competitive to that controlled by transferees have been detailed and all do face substantial competition in both circulation and advertising sales from the Atlanta Journal and Atlanta Constitution. Circulation of the combined Times-Journal papers totals only approximately 15% of that of the Atlanta Journal and Constitution. Despite this competition, however, transferees have shown a continuing expansion and have progressively over the years acquired control of virtually all Cobb County newspaper media. Such control has been augmented through expansion into nearby areas despite the existence of other weekly publications in those areas. And the entire area served by the combined newspaper interests of transferees receives service from Station WYNX, the station which they now seek to control.

67. Weighing the assertions of transferees as to added technical facilities as favoring a grant, the single concrete proposal advanced is the provision of the sum of $2000 for acquisition of mobile equipment for local program originations. The sum is insubstantial in relation to the normal costs of such equipment and there is no record evidence of the specific equipment to be acquired, or of the manner in which it would be utilized. Though extensive additional news coverage through an enlarged news staff and use of mobile equipment is asserted, the same wire service now utilized would be continued and the total broadcast time to be devoted to news programs is practically identical to both that broadcast during the 1969 composite week by the present licensee and that proposed for future operations, the totals being 11¾ hours, 11 hours 39 minutes and 11¼ hours, respectively. Local and regional news of the area WYNX principally attempts to serve now make up 50% of news content, and there is no indication transferees would substantially change this figure. Though an im-

proved technical operation resulting in less outage time is also urged as basis for the required conclusion that grant of the application would serve the public interest, there is little factual support for such a conclusion. Power and transmitter failures have been the principal cause of Station WYNX intermittently having to leave the air and there is no evidence indicating that Station WYNX has experienced an abnormal number of outages from all causes. Transferees have not specified an auxiliary power supply or transmitter nor do they detail the spare parts that would make up what is termed an "effective level." Moreover, the Commission's Rules neither specify nor require the maintenance of spare parts though Station WYNX does, as do most stations, carry some such parts particularly spare tubes. Station WYNX was off the air for a period of four days in a single instance due to necessary equipment replacement, but it was for failure of a major piece of equipment, not something that would be carried normally as a spare part.

68. To summarize, it is within Smyrna, Marietta and their surrounding areas including the whole of Cobb County, that transferees have since 1951 controlled the only daily newspaper. It is within this same general area that they have in an 11-year period taken over control of all but one of the weekly newspapers published in Cobb County in addition to acquiring weeklies in other nearby communities. This was done through a merger (paragraph 13, *supra*), the purchase of various publishing companies (paragraphs 14, 15, 16, 17, and 19, *supra*) accounting for 15 of the weekly Neighbor papers and through commencement of publication of nine additional papers. By the instant application transferees seek to expand into the broadcast field in this same area and a necessary corollary to approval of the transfer sought is an affirmative finding that it would serve the public interest. The concentration of control over mass media of communications in Smyrna and its environs which led to the initial concern of the Commission in designating the application for hearing has, however, been fully established by the record. The benefits urged by transferees as to improvement in the technical and news operation of the station under the proposed transfer are from a public service standpoint insubstantial if implemented and, because of a lack of specific proposals, largely speculative. Under the present ownership, Station WYNX does provide a local transmission facility to Smyrna and its environs independent of transferee's dominant media in that area and in full accord with the Commission's suburban station policies. If the Commission's concern as to diversification of the ownership of mass media is to be given meaning in the context of this proceeding there is no possible ground upon which an affirmative finding that the proposed transfer would serve the public interest can be based.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application herein for transfer of control of Jonquil Broadcasting Co. is denied.

FEDERAL COMMUNICATIONS COMMISSION,
FOREST L. MCCLENNING,
Hearing Examiner.

F.C.C. 72-780

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)) FILED BY STATION WRTV, INDIANAPOLIS, IND., FOR THE OCTOBER 1–28, 1972, PERIOD

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission here considers an "Application for Waiver of Prime Time Access Rule", filed August 15, 1972, by McGraw-Hill Broadcasting Company, Inc., licensee of Station WRTV, Indianapolis, Indiana (NBC-affiliated and formerly WFBM–TV, under a different licensee). The request relates only to the period between October 1 and October 28, 1972, and is based on the fact that Indianapolis, unlike most of the United States, does not observe daylight-saving time. McGraw-Hill seeks in its request only permission to designate, during this period, the hours 6 to 10 p.m. (local time, which is E.S.T.) as prime time for the purpose of the rule, instead of the 7–11 p.m. period provided generally for stations in the Eastern and Pacific time zones. The 6–10 period, of course, corresponds to the 7–11 segment which is prime time in the much greater portions of the Eastern zone where daylight saving time is observed. Network prime-time material, which occupies generally the hours from 8 to 11 p.m. E.D.S.T., thus is transmitted to Indianapolis stations at 7 to 10 p.m. Indianapolis time.

2. The other two Indianapolis network stations have operated since late April under a similar waiver; the former licensee of this station stated at that time that it did not need and would not seek waiver for the whole daylight-saving time period, but might seek it later, for the period in October when daylight-saving time is still in effect in the country generally though not in Indianapolis, and when the new "off-network" restriction of the prime time access rule is also in effect (Section 73.658(k)(3)).

3. It appears from the present request that the station does not need waiver to accommodate network material as such, since it presents three hours of it each night (7–10 p.m. local time); but rather because of the "off-network" restriction which first becomes effective October 1. It presents the "Wild, Wild West" off-network program from 10:30 to 11:30 local time six nights a week, so that if the prime hours remain

as specified in the rule, it would be presenting a total of 3½ hours of network and "off-network" material combined, more than is permissible. McGraw-Hill states that it intends to make schedule changes on October 29 anyhow, at the date that network programs shift to 8–11 Indianapolis time (including elimination of this off-network program), and simply wants to retain its present schedule until that date, rather than having to make two changes within a short time and thus confuse and disrupt viewing patterns.

CONCLUSIONS

4. Upon consideration of this matter, we conclude that waiver is warranted. As noted in paragraph 2, above, a similar waiver was granted to the other two Indianapolis stations late in April, for the entire daylight-saving time period, and, while the station which is now WRTV did not join in the request at that time, there appears no reason why that should prejudice its request now. We have recognized these anomalous "non-advanced time" situations in other connections recently, and it appears appropriate to do so here also. It is hoped that these situations can be resolved on an over-all basis before the next daylight-saving time period.

5. In view of the foregoing, IT IS ORDERED, That Station WRTV, Indianapolis, Indiana, for the period beginning October 1, 1972, and ending October 28, 1972, MAY DESIGNATE "prime hours" for the purpose of Section 73.658(k) as 6 to 10 p.m. Indianapolis local time; the election, if made, to be irrevocable for the period.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-782

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
VARIOUS REQUESTS FOR WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)) IN CONNECTION WITH SPORTS EVENTS DURING THE FALL OF 1972

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission here considers certain requests for waiver of the "prime time access rule" (Section 73.658(k) of the Commission's Rules) with respect to various sports events occurring and to be televised during the fall and early winter of 1972. The requests are contained in petitions filed on May 16, 1972 by the National Broadcasting Company, Inc. (NBC), July 25, 1972 by the Columbia Broadcasting System, Inc. (CBS) and July 20, 1972 by the licensee of Station KTVK, Phoenix, Arizona (ABC-affiliated).[1] Earlier events covered in these petitions have been dealt with in other Commission actions, the most recent being FCC 72-723 (released August 10, 1972), which covered events through September 10, 1972. The present decision covers all of the remaining events mentioned in these requests.

2. The request of KTVK, Phoenix, relates to two NFL pro football games on ABC, Monday nights September 18 and 25, respectively, starting at 9 p.m. E.T. This is 6 p.m. Mountain *Standard* Time, which prevails in Phoenix, and means that the entire game telecast will occur during prime time. If the game should run over 3 hours, this would mean network material during prime time in excess of that permissible under the rule. Waiver is sought only to accommodate such "runovers" beyond three hours if they occur, which, as we have noted in the past, is unlikely (according to CBS and NBC data, it occurs less than 10% of the time in these pro football telecasts). KTVK states that it will present no other ABC material on these evenings.

3. The CBS and NBC requests relate largely to events occurring in the afternoon, but which could conceivably run till after 7 p.m. E.T. Mentioned are NFL pro football games on 13 dates for each network between September 17 and December 17 (sometimes involving more than one game on each date), and certain special contests: for CBS, the NFL National Conference divisional playoffs (December 23 and

[1] With respect to NBC's request, the decision herein is based on information as to proposed scheduling supplied by that network's attorneys on August 28, 1972.

24) and championship game (December 31); and for NBC, the American and National baseball league playoff games, afternoon World Series games, which could involve this problem, and the NFL's American Conference divisional and championship games. It appears that all of the regular season football games involved will start no later than 4 p.m. E.T., and the same appears to be pretty much true of the special contests last mentioned. Normally, as mentioned, they would be expected to conclude by 7 p.m. E.T., but there is always a chance that weather delays, etc. would cause them to run longer than usual, and, in the case of the baseball and football playoff games, extra innings or "sudden death" playoffs might extend the games beyond the usual time.

4. Some of NBC's requests concerning afternoon games refer to "pre-game shows", i.e., in connection with the baseball divisional playoffs and afternoon World Series games which might involve "runovers", and the later football Conference playoff games. From information submitted by NBC's attorneys on August 28, 1972, it appears that what is contemplated is a pre-game show starting at 4 p.m. E.T. but not lasting a half-hour, so that the game itself should start about 4:15 p.m.

5. NBC's original request also included waiver for up to three evening World Series games, to include a pre-game show starting perhaps as early as 7:30 p.m. E.T. According to the August 28 information, NBC has now changed this proposed scheduling, and plans to start the telecast at 8 p.m. E.T., with the game itself starting somewhat later. This presents no problem in the Eastern and Central time zones, where the "runover", if any, would occur outside of prime time; but it could in the Mountain zone, where the program (broadcast simultaneously throughout the U.S.) would start at 6 p.m. M.D.S.T., and thus all of the telecast would be in prime time. Also, in the Pacific time zone, where the telecast would begin at 5 p.m. P.T. and run till 8 or later, the game itself presents no problem in this connection; but NBC plans later to present on its own Los Angeles station, and perhaps other NBC affiliates in this area will carry also, a movie which has recently run on the network and thus would be either "network" or "off-network" material. This would run from 9 to 11 p.m. P.T., and, if the earlier World Series telecast exceeds 1 hour of prime time, these stations would not be in compliance with the rule. Waiver is sought in case this should happen.

CONCLUSIONS

6. In general, it appears that waiver is warranted in most of these situations. As these parties point out, in "Footnote 35" of the Report and Order adopting the rule (23 FCC 2d 382), it was indicated that waiver would be granted in the case of sports events, whose duration is not within the control of the network, where normally they would be expected to conclude before prime time but weather, extra innings, etc. might make them run longer on occasion. We have granted such requests previously, where events starting no later than about 4 p.m. E.T. are involved, and a similar approach appears appropriate in the present cases. See, for example, 32 FCC 2d 58 (October

1971). Likewise, we have previously granted waivers in the Phoenix situation.

7. With respect to NBC's afternoon sports events involving "pre-game" shows, waiver is warranted since it appears reasonably probable that most of the events will be over by 7 p.m., provided the game itself starts about 4 p.m. or, where preceded by a "pre-game" show, no later than approximately 4:15 E.T. We emphasize that the waiver in this case is made only in connection with a small number of live games of unusual importance (play-off and championship games) and not for regular-season contests. Waiver is granted in paragraph 9 below on this basis, in case the later telecast of the game itself should run until after 7 p.m.

8. We also believe that waiver is warranted with respect to NBC's proposed World Series telecasts, as revised on August 28 and mentioned above. As noted, starting at 8 p.m. E.T., these present no problems in the Eastern and Central zones, where more than 80% of the "top 50 markets" and their prime-time homes are located. As to the Mountain zone (to accommodate a "runover" if any) and the Pacific zone (to permit two hours of additional programming in addition to the World Series telecast) we believe waiver is appropriate in case it should be needed. We have noted in previous decisions the problems involved in these zones, when special live "simultaneous" material such as sports must be fitted into the usual pattern of delayed broadcasting;[2] and we believe a similar approach is appropriate here.

9. In view of the foregoing, IT IS ORDERED, That notwithstanding the limitations contained in Section 73.658(k);

(1) Station KTVK, Phoenix, Arizona, MAY CARRY TO COMPLETION the ABC football games telecast on Monday evenings, September 18 and 25, 1972;

(2) Stations affiliated with (or owned commonly with) the CBS and NBC networks MAY CARRY TO COMPLETION professional baseball or football games (but not including any post-game material), without any of the time counting toward the permissible three hours of network prime-time programming, provided the game itself starts no later than about 4 p.m. E.T., or where it is a playoff or championship game preceded by a "pre-game show" and the game itself starts no later than about 4.15 p.m. E.T.; and

(3) Stations affiliated or under common ownership with the NBC network in the Mountain and Pacific time zones MAY SCHEDULE AND PRESENT NBC evening World Series telecasts, and other NBC programming the same evening, on the assumption that the World Series telecast occupies no more than three hours of prime time in the Mountain time zone and no more than one hour of prime time in the Pacific time zone.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] See *Miss America and Academy Awards* programs, 33 FCC 2d 743; *Democratic National Telethon Committee*, 24 R.R. 2d 852; and *Station KOOL–TV*, Phoenix, Arizona, FCC 72–735, August 16, 1972.

F.C.C. 72R-228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RKO GENERAL, INC. (WNAC-TV), BOSTON, MASS.	Docket No. 18759 File No. BRCT-63
For Renewal of Broadcast License	
COMMUNITY BROADCASTING OF BOSTON, INC., BOSTON, MASS.	Docket No. 18760 File No. BPCT-4198
THE DUDLEY STATION CORP., BOSTON, MASS.	Docket No. 18761
For Construction Permit for New Television Broadcast Station	File No. BPCT-4271

MEMORANDUM OPINION AND ORDER

(Adopted August 16, 1972; Released August 18, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. This proceeding involves the mutually exclusive applications of RKO General, Inc. (WNAC-TV) (RKO) for renewal of license of its television broadcast Station WNAC-TV in Boston, Massachusetts; and of Community Broadcasting of Boston Inc. (Community) and The Dudley Station Corporation for authorization to construct new television broadcast stations in the same community. The proceeding was designated for hearing by Order of the Commission (FCC 69-1335, 34 FR 19852, published December 18, 1969). Presently before the Review Board is a petition to enlarge issues against RKO General, Inc., filed April 19, 1972, by Community requesting the Board to add *ex parte* and abuse of process issues against RKO.[1]

2. In its petition, Community contends that RKO's "Petition to Expedite Partial Resolution of Inquiry," filed on March 21, 1972, in Docket No. 19154 (Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing Process), copies of which were sent to the individual commissioners and counsel in Docket Nos. 16679-80 (KHJ-TV Renewal) and 18759-61 (WNAC-TV Renewal), was an *ex parte* contact. In support of this contention, Community asserts that RKO in its petition encouraged the Commission not to consider "media diversification, local ownership, as integration of ownership and management in comparative Broadcast cases involving an application for renewal of an existing license, if the media holdings of the renewal applicant conform to the existing rules and regulations of the Commission." If the Commission were to adopt RKO's proposition, Community argues, it would be tantamount to assurance that RKO's licenses would be renewed unless it is disqualified under one of the existing character issues. The fact

[1] Also before the Board are: (1) opposition, filed May 2, 1972, by RKO; (2) opposition, filed May 3, 1972, by the Broadcast Bureau; and (3) reply, filed May 9, 1972, by Community.

109-008—72——8

that Community received a copy of the petition does not mitigate the *ex parte* nature of the contact, Community argues, because Community was not a party to the rulemaking proceeding and, therefore, could not be "served". Community urges that RKO's late filed petition encompassed a matter beyond the scope of the inquiry in the Docket 19154 proceeding, since the Commission specifically excluded consideration of the question of diversification from the inquiry and the inquiry expressly precluded pending proceedings from the policies to be announced. In the event that the Board does not add an *ex parte* issue, petitioner urges the Board to add an abuse of process issue on the ground that RKO attempted to utilize a petition in a rulemaking proceeding to influence the Commission in the instant adjudicatory proceeding.

3. The Review Board agrees with RKO and the Broadcast Bureau that Community's petition should be denied. Petitioner's argument that, even though it received a copy of RKO's petition, it was not "served" since it was not a party to the rulemaking proceeding is, in our view, specious. As pointed out by RKO, the consequences of accepting Community's argument would be that no party to a restricted proceeding could participate in a rulemaking proceeding in which policy possibly affecting the restricted proceeding is under consideration. Clearly, this is not the intent of the *ex parte* rules. The uncontested allegations reflect that Community was, in fact, served with a copy of RKO's petition,[2] and therefore no *ex parte* presentation was made.[3] Finally, the fact that RKO filed a petition in the rulemaking proceeding urging the Commission to take a position which might benefit RKO in pending renewal proceedings affords no basis for the addition of an abuse of process issue. In *Western Broadcasting Co.*, 35 FCC 789, 1 RR 2d 732 (1963), the only case cited by the petitioner in support of this request, an applicant's bad faith with both the Commission and a competing applicant resulted in the dismissal by default of the competing application. No comparable bad faith conduct has been shown here. In short, the Board finds petitioner's allegation completely insufficient to warrant adding either of the requested issues.

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues against RKO General, Inc., filed April 19, 1972, by Community Broadcasting of Boston, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] The fact that RKO's proof of service may have been defective and that courtesy copies were sent to individual Commissioners and that RKO had not previously participated in the rulemaking proceeding, do not vitiate the fact that service occurred, or in any other way bring RKO's pleading within the proscriptions of the *ex parte* rules.

[3] In view of our determination that Community was, in fact, served by RKO, we need not and do not determine whether such service was required.

F.C.C. 72R-208

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SALEM BROADCASTING CO., INC., SALEM, N.H.	Docket No. 19434 File No. BP-18325
NEW HAMPSHIRE BROADCASTING CORP., SALEM, N.H.	Docket No. 19435 File No. BP-18479
SPACETOWN BROADCASTING CORP., WEST DERRY, N.H.	Docket No. 19436 File No. BP-18492
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 3, 1972; Released August 7, 1972)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding, involving the mutually exclusive applications of Salem Broadcasting Co., Inc. (Salem), New Hampshire Broadcasting Corporation (New Hampshire), and Spacetown Broadcasting Corporation (Spacetown) for new standard broadcast stations, was designated for hearing by Commission Order, FCC 72-136, released February 15, 1972. Presently before the Review Board is a petition to enlarge issues, filed March 13, 1972, by New Hampshire [1] seeking the addition of six issues, including the following, against Spacetown:

> (a) To determine whether the station location applied for by the applicant is a particular city, town, political subdivision or community or an integral part of another city or town as contemplated by Section 73.30(a) of the Commission's Rules;
>
> (b) To determine whether, if it is determined that the applicant realistically proposes to serve a community other than its specified community, it meets the technical requirements of the Commission's Rules for such community including Section 73.188.

The remaining issues requested relate to Spacetown's financial qualifications.

SPECIFIED STATION LOCATION

2. New Hampshire requests an issue concerning the specified station location of Spacetown because, New Hampshire alleges: (a) the applicant's principal community, West Derry, is not listed in the 1970 U.S. Census; (b) West Derry has no meaningful existence independent of Derry Town; (c) all demographic information submitted by the applicant deals with the composition of Derry Town; and (d)

[1] Also before the Review Board are: (a) errata to New Hampshire's petition, filed March 14, 1972; (b) opposition, filed March 28, 1972, by Spacetown; (c) opposition, filed March 28, 1972, by the Broadcast Bureau; and (d) reply, filed April 18, 1972, by New Hampshire; and (e) motion to accept late filed reply, filed April 18, 1972, by New Hampshire. Since the delay was only two days, the other parties to the proceeding do not object to the late-filed reply, and no prejudice would be caused by its acceptance, the Board will accept the pleading.

Spacetown's survey of community needs is notable for the fact that, of the thirty-two community leaders consulted, only one indicated any official connection with West Derry, only three of the 61 members of the general public mentioned West Derry, and no one in either group indicated residence in West Derry.[2] In opposition, Spacetown states that West Derry is a "distinct community and the urban center of the Town of Derry"; it is a "political subdivision, established separately as such for taxing purposes, which contains the established business area of the overall minor civil division." Although unincorporated, it does have definite boundaries, according to Spacetown.[3] Further, Spacetown states that West Derry did appear in the 1960 Census, but is reported as Derry Compact in the 1970 Census. Finally, Spacetown argues that New Hampshire's reliance on *Seven Locks Broadcasting Co.*, FCC 62–140, 22 RR 967, 970 (1962), as requiring Spacetown to establish that West Derry has "an identifiable population grouping separate and distinct from all others" is misplaced since, upon reconsideration,[4] the Commission indicated that such a burden on the applicant would be too strong and that a return to existing precedent was preferable. The Broadcast Bureau, in its opposition, urges that since Spacetown's principal community did appear in the 1970 Census (as Derry Compact) it is a community for purposes of Section 73.30(a) of the Commission's rules. In reply, New Hampshire reiterates its position and submits letters from Morton A. Myer, Chief, Geography Division, Bureau of the Census, and the Town Clerk of Derry, New Hampshire, to support its motion. The letter from Mr. Myer indicates that the Census Bureau bases its determination of unincorporated areas such as West Derry and Derry Compact on population groupings only, without regard to their legal or administrative status, and that the boundaries of these areas change with the population from census to census. New Hampshire points out that Spacetown's Attachment B to its opposition shows that the place designated as "Derry Compact" in the 1970 Census contains significantly more area than the place designated as "West Derry" in 1960. Further, petitioner notes, the letter from the Town Clerk of Derry states unequivocally:

> That an area in the Town of Derry which has been referred to as West Derry is an integral part of the Town of Derry. It is not a separate political subdivision and is totally integrated with the Town of Derry and is not treated separately for tax purposes.

Finally, New Hampshire alleges that Spacetown chose "West Derry" as its specified community because its proposal would not meet the technical requirements of Section 73.188 of the Commission's Rules if Derry were the specified community.[5]

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[2] New Hampshire also urges that Spacetown's *Suburban* showing is deficient as to "West Derry" since it is Derry that is most often mentioned in responses. The Review Board agrees with the Broadcast Bureau that since a *Suburban* issue has been designated against Spacetown, the inquiry would also encompass this matter.

[3] The only substantiation for the boundaries of West Derry and Derry Compact is a map (Attachment B page 4) submitted with Spacetown's opposition, which illustrates boundary lines for these areas obtained from the Census Bureau. As discussed, *infra*, these boundaries are based on population groupings only and may change with each Census.

[4] 37 FCC 82, 3 RR 2d 177 (1964).

[5] Page 4 of Attachment B, submitted with Spacetown's opposition, indicates that its present proposal will not place a 5 mv/m signal over the entire town of Derry.

3. The Commission has, in the past, adopted a liberal attitude regarding the definition of a community for Section 73.30(a) purposes. See, *e.g.*, *Seven Locks Broadcasting, Inc., supra; Verne M. Miller*, 3 FCC 2d 145, 7 RR 2d 455 (1966); and *Mercer Broadcasting Company*, 22 FCC 1009, 13 RR 891 (1957). However, this liberal interpretation would not permit an applicant to designate the business district of a separate and distinct community as its principal city, for the purposes of Section 73.30. Contrary to Spacetown's assertions, West Derry does not appear to be a political subdivision for any purpose and has no defined boundaries. In addition, the responses of those surveyed appear to support New Hampshire's allegation that most residents of Derry are not even aware of something called "West Derry". Further, if the main business area of the town of Derry is separated out, as petitioner suggests Spacetown is attempting to do, there would be almost no chance for the remaining residents of Derry to obtain their own local service. In the Board's opinion, nothing in *Seven Locks* or other Commission precedent changes the *caveat* that although there is no rigid definition of a community, the area specified must not in fact be a part of another community. *Marion Moore*, 3 RR 2d 920 (1964); *Cf. 1360 Broadcasting Co., Inc.*, 36 FCC 2d 1478, 2 RR 2d 824 (1964). Therefore, in order to determine if Spacetown is in fact attempting to designate the business district of a small town as its Section 73.30 "community", the Board will add the requested issue.[6]

FINANCIAL ISSUES

4. New Hampshire also requests financial issues against Spacetown, based on the facts that Spacetown's estimate of its first-year operating expenses is significantly lower than those of Salem and New Hampshire, and that Spacetown's agreement with its equipment supplier provides for only 10% down payment and deferral of first-year principal payments for a period of one year.[7] In opposition, both Spacetown and the Bureau argue that New Hampshire has failed to show that Spacetown's first year estimate is unreasonable. Spacetown also notes that its cost of operation would be lower than the other applicants since it is proposing a smaller staff and a 1 kw operation in contrast to their 5 kw proposals. In addition, Spacetown asserts that even if it had to add in the additional amount of its deferred first-year principal payments to its first-year costs, such costs would be increased to only $66,929, which is well within the $75,000 funds available to Spacetown.

5. The Review Board will deny the addition of the requested financial issues. New Hampshire's general allegation that Spacetown's estimated cost of first year operation is lower than those of its two competing applicants is insufficient to warrant the addition of an issue.[8]

[6] Petitioner's request for a contingent issue inquiring into compliance with Rule 73.188 for some community other than Spacetown's specified station location will be denied. While a comparable issue might be appropriate if Suburban Community issues were being added, *i.e.*, to determine whether an applicant proposes a realistic transmission service for some community other than its specified community, no such issues are being added herein, and therefore inquiring into compliance with the technical requirements for a community other than the specified community would not be appropriate.

[7] New Hampshire also requested inquiry into Spacetown's reliance on the $10,000 pledge of Thomas C. Pipilas, who died on September 18, 1971; but withdrew this request when informed of Spacetown's January 19, 1972 amendment indicating that the obligation had been assumed by a Mr. Van Anagnost.

[8] *Eastern Broadcasting Corp.*, 28 FCC 2d 28, 21 RR 2d 417 (1971).

New Hampshire has not detailed any specific items in Spacetown's application that it contends have been underestimated; therefore, its allegations lack the specificity required by Section 1.229 of the Commission's Rules for designation of the requested issue. See *Long Island Video, Inc.*; 12 FCC 2d 1016, 13 RR 2d 238 (1968). In addition, New Hampshire's allegation that Spacetown would not have sufficient funds to cover its first-year operating expenses without an agreement with its equipment supplier deferring first-year principal payments for a period of one year is, standing alone, insufficient to raise a substantial question to Spacetown's financial qualifications. Moreover, any doubt in this regard has been satisfied by Spacetown's amendment of January 19, 1972, illustrating total funds available in the amount of $75,000 (an increase of $10,000) to cover first-year expenses.

6. Accordingly, IT IS ORDERED, That the motion to accept late filed reply, filed on April 18, 1972, by New Hampshire Broadcasting Corporation IS GRANTED, and the reply pleading IS ACCEPTED, and that the petition to enlarge issues, filed March 13, 1972, by New Hampshire Corporation, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

7. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

To determine whether the station location applied for by Spacetown Broadcasting Corporation is a particular city, town, political subdivision or community, as contemplated by Section 73.30(a) of the Commission's Rules;

8. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the added issue SHALL BE on Spacetown Broadcasting Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-221

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CEASE AND DESIST ORDER TO BE DIRECTED AGAINST SERVICE ELECTRIC CABLE TV, INC., ALLENTOWN AND BETHLEHEM, PA.	Docket No. 19321 Files Nos. SR-97014 and SR-8701

MEMORANDUM OPINION AND ORDER

(Adopted August 8, 1972; Released August 11, 1972)

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration the appeal from Hearing Examiner's interlocutory rulings, filed on April 18, 1972, by WBRE-TV, Inc.[1]

2. Service Electric Cable TV, Inc. (Service Electric) operates a CATV system in Allentown and Bethlehem, Pennsylvania, and currently among the stations carried is the signal of KYW-TV, Philadelphia, Pennsylvania. KYW-TV, affiliated with the NBC network, operates on television Channel 3. WBRE-TV, Inc. (WBRE), licensee of Station WBRE-TV, Channel 28, Wilkes-Barre, Pennsylvania, affiliated with NBC, contends that its signal has priority over the KYW-TV signal in Allentown and Bethlehem for purposes of Rule 76.91, which requires a cable company, upon request, to give network program exclusivity to the station having priority.[2]

3. The parties do not dispute the fact that WBRE-TV has priority over KYW-TV if the respective contours are calculated by the FCC predicted contour method.[3] However, Service Electric submitted measurement data (Service Electric Exhibit 1)[4] taken on the operations of KYW-TV and WBRE-TV which indicate that the two stations are of equal priority in Allentown and Bethlehem.[5] Service Electric's consulting engineers testified that the measurements were taken according to

[1] Also before the Review Board are: (a) opposition, filed on April 28, 1972, by Service Electric Cable TV, Inc.; (b) opposition, filed on April 28, 1972, by the Cable Television Bureau; (c) reply to oppositions, filed on May 10, 1972, by WBRE-TV, Inc.; (d) a letter and attached engineering study, filed on May 12, 1972, by WBRE-TV, Inc.; (e) letter, filed on May 24, 1972, by Service Electric Cable TV, Inc.; (f) letter, filed on May 30, 1972, by WBRE-TV, Inc.; and (g) letter, dated June 7, 1972, by Service Electric Cable TV, Inc.

[2] The order of priority is: (1) all television broadcast stations within whose principal community contours the community of the CATV system is located; (2) all television stations within whose Grade A contour the community of the CATV is located; and (3) stations within whose Grade B contour the CATV community is located.

[3] The parties stipulated (Cable Television Bureau Exhibit 1) that Allentown and Bethlehem both receive a predicted city grade signal from WBRE-TV and a signal less than city grade from KYW-TV.

[4] Measurements were taken on WBRE-TV and KYW-TV during the period from November 5 through November 12, 1971. On WBRE-TV the following radials and locations were measured: 146.8 degrees, 24 locations from 8.4 to 55.0 miles; 152.4 degrees, 26 locations from 8.4 to 62.2 miles; and 156.5 degrees, 24 locations from 7.2 to 55.8 miles. For KYW-TV: 341.0 degrees, 26 locations from 8.4 to 58.8 miles; 345.5 degrees, 35 locations from 8.3 to 77.1 miles; and 351.4 degrees, from 8.6 to 58.3 miles.

[5] According to Service Electric a Grade A contour from both stations penetrates Allentown, and both stations provide a Grade B signal for Bethlehem.

the methodology prescribed by the Television Allocations Study Organization (TASO).[6] However, on each radial, location of the contours is based on the last location measured with a signal sufficiently high to represent a particular contour. Service Electric's engineer stated that while under ordinary circumstances a smooth curve would be drawn through the measured locations as an aid in locating the desired contour, here because the nature of the terrain resulted in jagged graphs, the contour was located at the last measurement point with a signal sufficiently high to represent a particular contour. The Examiner accepted Service Electric Exhibit No. 1 in evidence.

4. WBRE–TV submitted evidence to rebut the Service Electric showing including measurements taken by its consulting engineers during January and February 1972. All of the WBRE measurements were made on the WBRE–TV operation. (WBRE accepted the Service Electric showing of the KYW–TV contours.) WBRE elected to also follow the TASO methodology with the main exception being that no points were measured closer than 43.9 miles to the station.[7] The objective of the WBRE measurements was a partial replica of the measurements made in November 1971, *supra*. WBRE indicated its measurements were made on the same radials as those indicated by Service Electric. However, the WBRE radials followed slightly different paths from that shown by Service Electric. As a result, the same points were not measured by both parties. WBRE concluded that WBRE–TV places a higher priority signal in Allentown and Bethlehem than does KYW–TV.[8] Subsequent to objections by the Cable Television Bureau and Service Electric that the WBRE measurements were incomplete and did not demonstrate the precise location of the actual contours of either WBRE–TV or KYW–TV (Tr. 166), the Examiner rejected WBRE Exhibits Nos. 1 and 2 (Tr. 180, 185). WBRE's instant appeal is from this ruling of the Examiner. In the event that the Board does not reverse the Examiner's ruling rejecting the WBRE exhibits, WBRE requests that it be permitted to introduce a complete TASO study of the radials used in such exhibits.

5. Service Electric alleges that the subject WBRE–TV Exhibits are "incompetent" spot measurements and of "no rational probative value." Service Electric points out that WBRE said they were making a "partial replica" of the Service Electric survey, yet the WBRE data were taken at different locations from those measured by Service Electric. The Cable Television Bureau also objects to the incomplete nature of the WBRE exhibits, contending that the measurements therein are "spot" measurements which it considers unacceptable (citing *Everett*

[6] TASO presented a report to the Commission in 1959, parts of which are being considered in Docket No. 18052, a rule making procedure which looks toward establishing standards for the taking of measurement data in the FM and TV broadcast services.

[7] The WBRE measurement data were taken between January 31 and February 1, 1972. Three radials were measured: 146.8, 152.4 and 156.5 degrees. On the 146.8 degree radial, five locations were measured from 43.9 to 48.02 miles. On the 152.4 degree radial, three locations were measured from 43.95 to 47.9 miles. On the 156.5 degree radial, three locations were measured from 44.05 to 48 miles.

[8] According to WBRE, signals were measured above city grade within or beyond both Allentown and Bethlehem. WBRE did not depict contours for its operation, but assumed that a signal level above that required to represent a contour was sufficient to indicate the extent of a contour.

Cablevision, Inc., 19 FCC 2d 831 (1969) and *Pittsfield-Dalton TV Cable*, 22 FCC 2d 189 (1970)).[9]

6. WBRE contends that any measurement data taken in addition to that already offered in its Exhibits 1 and 2 would be "mathematically irrelevant." This contention is based on the WBRE belief that its measured data are sufficient to define a contour. WBRE's position is that Service Electric could have taken fewer measurements than it did and have made the same contour location analysis. WBRE contends that its measurements, taken on mobile runs as suggested by TASO, are not "spot" measurements, and distinguishes the cases cited by the Bureau on the ground that the data in those cases was based on "spot" measurement data not taken on radials, or "pursuant to any methodology" that is acceptable.

7. Under the TASO recommended technique for taking radial measurements the measurements are to be started at exactly 10 miles from the station being measured with mobile runs being made for at least a distance of 100 feet at two-mile intervals until the signal has been attenuated to a sufficiently low value (generally below Grade B level). The measuring equipment, including a chart recorder, is installed in a motor vehicle which is driven over the "mobile run". If roads or paths are not available, the nearest possible location to the two-mile point is to be used. This is an acceptable method of taking measurements for use in adjudicatory proceedings. See *Potomac Valley Telecasting Corporation*, 21 FCC 2d 851, 18 RR 2d 469 (1970), wherein the Board discusses in detail the applicability of the TASO methodology, The Board held in *Potomac* (pp. 857–858) that measurements taken in substantial compliance with the TASO recommendations are useful and acceptable for "the purpose of rebutting the *prima facie* presumption relating to the prediction method of depicting coverage." Also, the Commission stated in *CATV Regulations*, 7 RR 2d 1627, 1643 (footnote 13), (1966), "Under the rules, the predicted Grade B contour may [be] refuted by an adequate showing of the actual contour," and in *Mission Cable TV, Inc. and Trans-Video Corp.*, 7 RR 2d 631, 638, (1966), "adequate field intensity measurements [are] relevant and admissible." Thus, it is clear that the Commission does permit the use of measurement data in such proceedings as this, and that the method recommended by TASO may be used. In all cases, however, sufficient data must be taken to clearly establish the location of the contours. The Commission stated in *Mission*, *supra*, at p. 638, "[I]t is necessary to make sufficient measurements along one or more radials, *depending on the nature of the terrain*, over sufficient distances to establish the fact that the results obtained are not unduly influenced by local conditions," and that, "Within any contour, whether calculated by the prediction method or on the basis of measurements, there may exist pockets of low signal intensity." [Emphasis added.] Conversely, there may be areas of high signal intensity. Hence, sufficient data are required to determine a contour for the purposes of determining priority.

[9] It is clear that the WBRE measurements are not "spot" or "random" measurements as described in *Everett* and *Pittsfield*, *supra*, when considered in light of the differences between the WBRE measurements and the two spot measurements taken in *Pittsfield*, and the random measurements taken in *Everett*. The mobile run data involves a chart recording of continuous field strength measurements made over a specified distance (at least 100 feet pursuant to TASO recommendations).

Since, *inter alia*, the limited WBRE data may only reflect signal strength resulting from "local conditions",[10] the Examiner was correct in rejecting the WBRE–TV exhibit.[11]

8. The Board stated in *Potomac*, *supra* (p. 859), that "[W]e do not believe that strict adherence to [the TASO] criteria is required in all respects . . . where the purpose is to determine location of contours." Therefore, in an area where the terrain is rugged or where obstacles prevent the strict compliance with the TASO methodology, some variance therefrom could be expected and accepted. However, since two or more persons making independent "judgments" in such circumstances are apt to differ in their decision, it seems imperative that a joint venture be undertaken so that these differences can be resolved in order to obtain measurement data acceptable to all parties. The Examiner repeatedly, but to no avail, suggested that the parties get together in the taking of the measurements; that the Examiner was acutely aware of the desirability of cooperative efforts by the parties is clearly apparent. As early as the prehearing conference of November 12, 1971, he discussed the problem and urged the parties to conduct the survey jointly. (Tr. 14–16, 17, 105, 114–115.)[12] The parties failed to do so and it is clear from the record to date that the failure of the parties to jointly take field intensity measurements is the major reason that there is not now before the Commission an uncontroverted set of such *measurements* from which the service contours of the pertinent stations can be determined. Contentions that a party took measurements at locations chosen to produce signal intensities greater than would be expected by random choice of locations; that WBRE–TV took partial measurements; and that some of the points reflected in Service Electric Exhibit No. 1 do not accurately reflect the proper signal strength at some of the points along these radials; all would have been avoided by joint field intensity measurements. Failure of the parties to follow this procedure has resulted in inordinate delay of this proceeding which the Commission has ordered expedited.

9. When necessary to provide a proper basis for making the public interest determination required by the Communications Act of 1934, as amended, the Commission has required parties to take field intensity measurements.[13] Thus, where there exist such disagreements and consequent delays in culminating the proceeding and making the required public interest determination as exist here, or where it is judged that such problems and delays are imminent, the parties reasonably may be directed to take joint field intensity measurements.[14] To eliminate further delay due to such disagreements, and to adduce the best evidence for the determination required by the Order to Show Cause herein,

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[10] Service Electric Exhibit No. 2 (withdrawn, but remaining on the record), discusses this point.

[11] Acceptance by the Board of the amendment now tendered by WBRE would be contrary to good hearing procedure, and would serve no useful purpose. See para. 10, *infra*.

[12] Service Electric's response to a query of the Examiner concerning cooperative efforts was, "Whatever the Rules require is what they will do". Tr. 14. Counsel for WBRE–TV stated that he could not commit his client; that if authorized by WBRE–TV he would "get together" with counsel for Service Electric. Tr. 17.

[13] *Babcom, Inc., et al.*, 31 FCC 2d 425, 428, 431 (1971), directed an applicant to take field intensity measurements. Rules 73.188(i) and 73.686 provide that the Commission, in its discretion, may direct that field intensity measurements be taken.

[14] It also appears reasonable that the Hearing Examiner in regulating the course of the hearing, may in similar circumstances require the taking of such measurements. Rule 1.243(f).

Service Electric and WBRE–TV must be required to jointly take field intensity measurements.

10. In this connection, the Board notes that in view of the difficulties already experienced by the parties in attempting to reconcile measurements which they made at different times and different points, and since the intensity of a television broadcast signal at a given point may be expected to vary as the result of seasonal, diurnal and short term fluctuations, it appears that the only acceptable basis for the public interest determination required herein would be the results of a joint venture by WBRE–TV and Service Electric to make the necessary field intensity measurements.[15] In the circumstances of this case, the continuation of the process whereby one party independently takes and submits measurements and the other party checks or criticizes such measurements shows no promise of a valid solution to the problem. This is illustrated in part by the wide discrepancies in the different fields measured by the two engineering firms involved in this proceeding—both of which are highly recognized in their field. Rather, it appears that in the absence of acceptable joint field intensity measurements, the disagreement will continue—with even further delays in arriving at a final determination. Since the parties have failed to respond cooperatively to the Examiner's suggestions concerning joint measurements, *supra*, and they have inordinately delayed this expedited proceeding, the Board considers that the time devoted to taking joint measurements, by eliminating a source of disagreement that could be pursued through all appeal procedures, will eliminate more delay than it will introduce.

11. Review of the pleadings before the Board and the record to date reveals problems encountered in this proceeding which deserve comment with a view toward minimizing future delay. Thus, in connection with the problems encountered in determining contour locations by drawing a smooth curve through measured points (because, due to the nature of the terrain, the graphs of such points are jagged)[16] (Tr. 97), it appears possible that an examination of the methodology used in *Potomac Valley Telecasting Corporation*, Docket No. 17510, *et al.*,[17] which also involved determinations of contour locations in mountainous terrain where measured field intensities varied widely, may offer useful guidance. Also, although the parties have determined "that the last point at which a particular grade of signal was measured would be the determination on that radial of this particular contour," (Tr. 97–98) the record does not indicate the extent to which alternatives to this procedure have been explored, or that they sought the benefit of the ex-

[15] The dispute over which party more accurately indicated the direction of the azimuths is totally irrelevant. The important thing here is for the parties to jointly agree on paths and points to be measured. Radials should be selected which are representative of paths leading to all parts of the area in question.

[16] As to jagged, or peaked, graphs, see *WSTE–TV, Inc.* (*WSTE*), 33 FCC 2d 438, 450, para. 29, (1972).

[17] Joint Exhibit No. 1; Potomac Valley Exhibit No. 1; Frostburg Exhibit No. 1; Keyser Television Co., Inc., No. 1; and the Review Board Decision therein (21 FCC 2d 851, review denied FCC 70–530, released May 26, 1970). In addition to smooth curves drawn through the jagged measured points, the Potomac Valley tabulations include a listing of the ground elevation (AMSL) at each measured point which is useful to reviewing authorities.

tensive experience [18] and documentation in this area which is available through, among others, the propagation experts of the Office of the Commission's Chief Engineer. This matter is pertinent in view of the engineering testimony that, "Where you ignore the variations in terrain and just take them [field intensity measurements] at arbitrary distances or as close to those distances as you can come, you come up with an average of what you would get had you measured the higher points and the lower points . . ." (Tr. 145), and the statement of counsel for Service Electric (at Tr. 173) that, "The whole foundation of the radial is that you take the good with the bad and you average it out and come out about right."

12. Accordingly, IT IS ORDERED, That the motion for leave to file appeal, filed on April 18, 1972, by WBRE–TV, Inc., IS GRANTED; and that the appeal from Examiner's interlocutory rulings, filed on April 18, 1972, by WBRE–TV, Inc., IS DENIED; and

13. IT IS FURTHER ORDERED, That Service Electric Cable TV, Inc., and WBRE–TV, Inc., ARE DIRECTED within sixty (60) days to make complete joint field intensity measurements to locate the pertinent WBRE–TV contours (or other disputed contours), and to take other actions consistent with the Memorandum Opinion and Order to expedite the resolution of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[18] *Cf. Present Knowledge of Propagation in the VHF and UHF TV Bands, T.R.R.,* Report No. 2.4.15, Office of the Chief Engineer, November 15, 1955; *Development of New VHF and UHF Propagation Curves for Television Broadcasting,* Report No. R–6502, Office of the Chief Engineer, April 26, 1965; *Report on Mobile Field Strength Measurements,* Research Division Report No. R–6302, February 12, 1963; *Report on Mobile Field Strength Measurements Taken with Receiving Antenna 10 Feet Above Ground,* Report No. R–6405, June 5, 1964.

F.C.C. 72R-229

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHLAND, INC., LAUREL, MISS. SOUTH JONES BROADCASTERS, INC., ELLISVILLE, MISS. For Construction Permits	Docket No. 19415 File No. BPH-7405 Docket No. 19416 File No. BPH-7445

MEMORANDUM OPINION AND ORDER

(Adopted August 18, 1972; Released August 23, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. This proceeding involves the mutually exclusive applications of Southland, Inc. (Southland) and South Jones Broadcasters, Incorporated (South Jones) for authority to construct new FM broadcast stations at Laurel, Mississippi, and Ellisville, Mississippi, respectively.[1] The applications were designated for hearing by Commission Order, FCC 72-100, released February 8, 1972, on various issues,[2] including a 307(b) issue and a limited financial qualifications issue against South Jones "to determine . . . whether a bank loan of $30,000 would be available to the applicant from the Merchants and Manufacturers Bank of Ellisville, Mississippi." Presently before the Review Board is a petition to enlarge issues, filed March 1, 1972, by Southland, requesting the addition of lack of candor, strike, financial, and Suburban Community issues against South Jones.[3]

LACK OF CANDOR—OTHER BROADCAST ASSOCIATIONS

2. Southland predicates its requests for lack of candor issues against South Jones [4] on an alleged collusive relationship between Glynn Earl

[1] The competing application of New Laurel Radio Station, Inc., for an FM station at Laurel, Mississippi, was dismissed with prejudice by Order of the Hearing Examiner, FCC 72M-355, released March 17, 1972.

[2] By Memorandum, Opinion and Order (FCC 72-491, released June 9, 1972), the Commission consolidated this proceeding with the one in Docket Nos. 19465-19467 for the limited purpose of resolving a Rule 1.65 issue against Gulf Broadcasting Company (Gulf), an applicant for a standard broadcast station in Gulfport, Mississippi. Two of the three partners in Gulf are each one-third stockholders in Southland. The issue was designated against Gulf because it failed to amend its application within the required thirty days to reflect the interest of these two partners in Southland. *Michael D. Haas*, 37 FR 6420 (1972).

[3] Also before the Board are the following related pleadings: (a) comments, filed March 15, 1972, by the Broadcast Bureau; (b) petition for waiver of Section 1.294 of the Commission Rules to allow a late filing of a response to Southland's petition to enlarge issues, filed March 23, 1972, by South Jones; (c) reply to (a), filed March 27, 1972, by Southland; (d) petition to deny the petition to enlarge issues [opposition], filed March 30, 1972, by South Jones; (e) opposition to (b), filed April 3, 1972, by Southland; (f) comment on (e), filed April 10, 1972, by South Jones; and (g) motion to accept comments and comments on pending petition to enlarge issues, filed April 25, 1972, by Voice of the New South, Inc. South Jones' petition for waiver of Rule 1.294 and New South's motion to accept comments will be granted. See notes 7 and 14, *infra*.

[4] Southland requests the addition of two lack of candor issues against South Jones, one relating to the failure of South Jones to report in its application the employment of one of its principals at a nearby radio station and the other relating to South Jones' financial showing. The latter issue is considered in paragraphs 6-10, *infra*.

Holland, president, director, and stockholder of South Jones, and Hubert D. Knotts, vice-president, director, and stockholder of South Jones, on the one hand, and Voice of the New South, Inc. (New South), on the other hand, to obstruct or delay the establishment of another FM station in Laurel, Mississippi. New South is the licensee of radio Stations WNSL AM–FM, Laurel. In support of the first lack of candor issue, Southland contends that, at the time of filing South Jones' application, Holland was Chief Engineer of New South's radio stations in Laurel.[5] Southland argues that Table II, Section II, of FCC Form 301 requires the applicant to disclose "any other business or financial enterprise in which a party has now or within the past five years has had either a 25% or greater interest or any *official relationship*". In Southland's opinion, the position of Chief Engineer is an "official relationship" which should have been reported. Southland notes that South Jones did report Knotts' position as program director at WNSL AM–FM; however, Southland asserts, South Jones has attempted to conceal from the Commission Holland's relationship with WNSL AM–FM. Southland also alleges that both Knotts and Holland are department heads at WNSL AM–FM, and are dependent, in whole or in part, upon these jobs for their livelihoods.

3. The Broadcast Bureau, in its comments, urges that without further explanation by South Jones as to the non-disclosure, an issue is warranted. The Bureau expresses the view that FCC Form 301 calls for the reporting of an engineering position like that held by Holland at WNSL AM–FM. The Bureau concludes that failure to report such information is inconsistent with Section 1.514 of the Commission's Rules.

4. In an opposition pleading[6] prepared by its president, Glynn Holland,[7] South Jones acknowledges that Holland has been employed as Chief Engineer at WNSL AM–FM since 1957. In 1959, according to South Jones, Holland was employed by WDAM–TV as an engineer and worked there for five years as a film editor. Presently, South Jones claims, Holland is an engineer at WDAM–TV, Laurel-Hattiesburg, and considers this his full-time job, although he still works part-time as an engineer for Stations WNSL AM–FM South Jones contends that it did not report Holland's relationship with WNSL AM–FM because South Jones understood "official relationship" to mean only those per-

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[5] In support of this and other allegations, Southland submits an affidavit of its vice-president and stockholder, F.M. Smith.

[6] The pleading is styled, "petition to deny the petition of Southland, Inc. to enlarge issues"; however, it will be considered as an opposition pleading. See Commission Rule 1.294.

[7] South Jones was not represented by legal counsel at the time it filed its opposition pleading. For this and other reasons, South Jones, on March 23, 1972, filed a petition for a waiver of Commission Rule 1.294, which required the filing of an opposition pleading by March 15, 1972. In support, South Jones argues that it believed that the issues raised in Southland's petition would be resolved at a prehearing conference. Southland opposes the request for waiver, arguing that it was incumbent on South Jones to file the pleading on time. In Southland's view, South Jones' excuses are not "meritorious". Basic fairness compels the Board to grant South Jones' waiver request. *Cf. D.H. Overmyer Communications Co.*, 6 FCC 2d 571, 9 RR 2d 97 1966). It appears that South Jones mistakenly believed that the issues requested by Southland would be considered at a pre-hearing conference. Furthermore, the request is not unduly late. More important, South Jones' responsive pleading would aid in clarifying the issue before us. See *Elim Bible Institute Inc.*, 10 FCC 2d 632, 11 RR 2d 751 (1967). We do note, however, that a party who elects to act without counsel must assume the burden of becoming acquainted with and conforming to the requirements of the Commission's Rules. *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 24 RR 2d 238 (1972).

sons who are involved in the decision-making processes or have a financial interest in an existing radio or television station.

5. The Review Board does not believe that either a lack of candor issue or a Rule 1.514 issue is warranted against South Jones. South Jones concedes in its opposition that it failed to report Holland's employment as Chief Engineer at WNSL AM–FM. There is no question that the language of paragraph 19 of FCC Form 301 required such a disclosure. *Payne of Virginia, Inc.*, 28 FCC 2d 66, 21 RR 2d 535 (1971). The "official relationship" language of the application form has not been limited solely to parties who have either financial or management interests in other broadcast companies.[8] However, in light of South Jones' reasonable explanation for the failure to supply the information in question (see paragraph 4, *supra*), we will not add a Rule 1.514 issue inquiring into the matter. In our opinion, South Jones' failures are "*de minimis* and not of sufficient magnitude to require an evidentiary inquiry." *Payne of Virginia, Inc.*, *supra*, 28 FCC 2d at 69, 21 RR 2d at 539. *Cf. Sunset Broadcasting Corp.*, 15 FCC 2d 276, 14 RR 2d 705 (1968). A lack of candor issue is also unwarranted. Southland did not, in our view, demonstrate that South Jones deliberately attempted to conceal Holland's employment at WNSL AM–FM.[9]

LACK OF CANDOR—FINANCIAL QUALIFICATIONS

6. In support of its second requested lack of candor issue, Southland avers that South Jones' Holland received a $5,000 loan on property he allegedly acquired for $4,385. According to petitioner, the land is to be used by South Jones as a studio and antenna site. Southland argues that it is highly questionable whether a bank would lend Holland $5,000 on property (land and a building) worth only $4,385. Furthermore, Smith, in his affidavit (see note 5, supra), avers that "inquiries on my behalf made at the court house in Ellisville indicated that there was no deed or other instrument recorded which indicated that South Jones . . . has title to the land and building allegedly purchased by South Jones Broadcasters, Inc." Next, Southland questions whether South Jones will be able to secure a $30,000 loan because South Jones neither submitted a bank line of credit nor did it initially indicate any guarantors. Finally, Southland suggests that there may be some assistance being given by New South to South Jones in financing its application, particularly in light of Knotts' and Holland's "weak financial position".

7. The Broadcast Bureau opposes the addition of the lack of candor issue with respect to South Jones' financial showing. Southland, the Bureau asserts, has not presented any specific allegations of fact and it has not submitted any affidavits of persons having personal knowledge of any financial agreement not delineated in South Jones' financial presentation in its application or any financial arrangement between New South and South Jones.

[8] See *Lamar Life Broadcasting Co.*, 26 FCC 2d 940, 952, 20 RR 2d 1014, 1030 (1970), reversed on other grounds 28 FCC 2d 654, 21 RR 2d 801 (1971).

[9] It is noted, however, that South Jones has not yet requested permission to amend its application to reflect Holland's employment at WNSL AM–FM. An amendment to this effect would appear appropriate.

8. In reply to the Bureau, Southland asserts that the requested issue is "supported by general knowledge of practical business and financial matters all in the public domain." Furthermore, Southland argues that Holland's unusual ability to obtain a 110% loan, that is, the $5,000 loan on property supposedly purchased for $4,385, should be further explored at hearing where the "actual facts" can be determined on cross-examination.

9. In its opposition, South Jones argues that it has been candid in its financial proposals to the Commission. With respect to the $30,000 loan from Merchants and Manufacturers Bank of Ellisville, which is co-signed by eleven businessmen of Ellisville, South Jones claims that it submitted an affidavit by the president of the bank, William D. Carmichael, stating that the loan would be renewable after a year and that the bank has extended a loan for $5,000 to Glynn Holland and Lorene Holland, his wife, secured by land and a building. South Jones explains with respect to the recording of the deeds that, "although they [the deeds] have not been recorded in the court house . . . it is not required for the title to be legal and official." South Jones firmly states that New South had nothing to do with these financial arrangements.

10. The Board agrees with the Bureau that Southland has not adequately complied with the specificity requirements of Rule 1.229(c). See *Almardon Incorporated of Florida*, 16 FCC 2d 395, 15 RR 2d 600 (1969); *Lorain Community Broadcasting Company*, 5 FCC 2d 810, 8 RR 2d 1141 (1966). Smith's affidavit is premised on "inquiries [made] on my behalf", and therefore does not comport with the first hand knowledge requirement of Rule 1.229(c). See *WTAR Radio-TV Corporation*, 31 FCC 2d 812, 828, 19 RR 2d 661, 681 (1970), review denied FCC 70–1251, released December 7, 1970. Any doubts which may have arisen from Southland's allegations have been adequately explained in South Jones' responsive pleading. South Jones submits a certified warranty deed and a quitclaim deed which show that the land and building for the proposed studio are owned by Holland and his wife. In an affidavit attached to South Jones' opposition, William D. Carmichael, President of Merchants and Manufacturers Bank, swears that on June 9, 1971, the bank extended a loan for $5,000 to the Hollands, the loan being secured by land and a building. The fact that the land was allegedly bought for $4,385, as petitioner alleges, is immaterial. South Jones has shown that the loan is available and that is the salient fact in regard to the requested issue. Finally, Carmichael states that the $30,000 loan to South Jones is secured by the signature of eleven persons "with an individual liability of $5,000 each" as a maximum limit,[10] and we have been presented with no persuasive reason to doubt the veracity of this statement or the *bona fides* of the proposed loan.

STRIKE APPLICATION ISSUE

11. As noted above, the lack of candor issues are premised, in part, upon Southland's broader contention that South Jones, in collusion

[10] The Commission specified an issue against South Jones to inquire into the availability of the $30,000 loan from Merchants and Manufacturers Bank of Ellisville, Mississippi. See paragraph 1, *supra*.

with New South, has filed its application for Ellisville in order to obstruct or delay Southland's application. In support, Southland notes that Laurel, the community which Southland intends to serve, has three AM stations and one FM station assigned to it; that New South is the licensee of the only AM–FM combination in Laurel; that Southland is the licensee of Station WLAU–AM in Laurel; and that Laurel has a population of 24,145 [11] and retail sales of $56,575,000 [12] whereas Ellisville, South Jones' proposed community of license, has a population of 4,643 and retail sales of $3,031,000. Based on these factual allegations, Southland argues that New South encouraged its employees, Holland and Knotts, to file an application to prevent Southland from becoming the second AM–FM combination in Laurel, thereby preventing Southland from gaining a stronger competitive position vis-a-vis New South. To substantiate its charge, Southland notes that it filed its application on March 3, 1971, and that South Jones filed its application shortly thereafter on March 29, 1971. Southland alleges that South Jones deliberately selected Ellisville to gain a competitive advantage due to the fact that Ellisville has no radio station assigned to it.

12. The Broadcast Bureau, South Jones and New South all oppose Southland's request for a strike issue. The Bureau does not believe that Southland has presented sufficient facts to warrant addition of the requested issue. The Bureau is of the opinion, though, that some explanation as to any participation by New South in the Ellisville application is required, particularly in light of South Jones' failure to disclose Holland's relationship to WNSL.

13. In its opposition, South Jones first points out that Holland signed the certification section of the application which requires the applicant to verify that it has not filed the application to "impede, obstruct or delay any other application." South Jones explains that Holland met with the Ellisville, Mississippi, Rotary Club on May 27, 1970 to discuss the possibility of applying for an FM station for Ellisville,[13] and that, on May 28, 1970, he ran an article in the Laurel *Leader Call* newspaper soliciting community responses as to the desirability of another FM station in Laurel. South Jones further explains that, on May 29, 1970, two of Holland's present employers, Granville Walters, manager of WNSL, and W. E. Jones, Jr., sales manager of WNSL, for whom Holland has worked for thirteen years, discussed with him his plans for a new station and they mentioned that he would be a competitor of WNSL, wished him success with the venture, and permitted Holland to remain in his present position until the application was granted. On April 14, 1970, South Jones continues, it obtained the site for the station, and, on January 9, 1971, South Jones was incorporated under the laws of the State of Mississippi, and, after weeks of negotiation, the Merchants and Manufacturers Bank of Ellisville, on March 21, 1971 agreed to lend $30,000 to the applicant. Furthermore, according to South Jones, WNSL's Walters and Jones were unaware, prior to

[11] Southland relies on the 1970 U.S. Census for its population figures.
[12] Southland relies on retail sales figures taken from the latest U.S. Census of Business (1967).
[13] South Jones submits with its opposition pleading an article from the *Leader Call*, a Laurel, Mississippi, newspaper, reporting Holland's appearance before the Rotary Club.

109-008—72——9

the filing of the application, that Knotts was also a party to the application; after discovering this, they allowed Knotts to continue in WNSL's employ. South Jones concludes by firmly asserting that New South did not participate or offer assistance in any of the above transactions.

14. In its comments,[14] New South contends that Southland has not complied with the requirement of Rule 1.229 to submit specific allegations of fact. According to New South, Southland's allegations are grounded solely on suspicion and conjecture. New South argues that South Jones has adequately explained that it had been preparing its application for about a year before filing and that a frequency study is unnecessary because the subject channel is the only FM channel assigned to Laurel. Southland is inconsistent in its arguments, New South submits, in that it maintains that it would be advantageous for New South's two stations to compete with an Ellisville FM facility rather than with a Laurel AM–FM combination, and, yet, in support of a Suburban Community issue, it argues that South Jones would primarily serve Laurel rather than Ellisville. (See paragraph 21, *infra.*) New South also asserts that, regardless of who is awarded the license, New South will be faced with another competitor in the market. Finally, New South submits affidavits from its four stockholders, directors and officers, in which each swears that he has not "planned, prepared or otherwise assisted" South Jones in the prosecution of its application.

15. It is well established that a strike issue is warranted when a substantial question is raised as to whether an application is filed for the principal or incidental purpose of impeding, delaying or obstructing the grant of another application. See *Al-Or Broadcasting Co.*, 37 FCC 917, 3 RR 2d 889 (1964), review denied FCC 65–99, released February 11, 1965, affirmed *per curiam sub nom. Corbett* v. *FCC*, Case No. 19,221, 6 RR 2d 2023 (D.C. Cir. 1965); *Sumiton Broadcasting Co.*, 15 FCC 2d 400, 14 RR 2d 1000 (1968). In determining whether a strike issue is warranted, the following factors are taken into consideration: the timing of the application in relation to the other application; the economic or competitive benefit derived from delaying, blocking, or frustrating the other application; good faith demonstrated by the applicant; and frequency selection or site location studies by the applicant. *Grenco, Inc.*, 28 FCC 2d 166, 167, 21 RR 2d 560, 562 (1966). Taking into consideration the above factors, the Board does not believe that the allegations made by the petitioner warrant addition of a strike issue in this case. First, we believe that South Jones' filing its application twenty-six (26) days after Southland's was fortuitous and appears to have been the culmination of months of preparation for filing. Therefore, the filing date cannot be considered indicative of a strike application in this case. Second, although another AM–FM combination in Laurel would present significant competition to New South, this factor, standing alone, is

[14] We will grant New South's unopposed motion to accept its comments on Southland's petition insofar as the petition alleges that New South participated in the filing of a strike application against Southland. See *Sumiton Broadcasting Co., Inc.*, 14 FCC 2d 256, 13 RR 2d 1143 (1968). *Cf. United Community Enterprises, Inc.*, 18 FCC 2d 555 n.1, 16 RR 2d 742 n.1 (1968).

insufficient to warrant addition of a strike issue.[15] *Cf. Grenco, Inc., supra.* Finally, we find it significant that Southland has alleged no facts whatsoever indicating that New South or any of its principals had anything to do with the South Jones application. Compare *Sumiton Broadcasting Co., supra.* In this regard, sworn statements from all of the parties charged with misconduct have been presented unequivocally denying any bad faith and petitioner has submitted no facts to contradict these statements. Therefore, the Board will deny Southland's request for a strike issue.

FINANCIAL QUALIFICATIONS ISSUE

16. Next, Southland requests a financial issue against South Jones to inquire into: pre-operational and legal expenses; expenses connected with the preparation of the studio-transmitter site; and the total funds required to construct and operate for one year.[16] In support, Southland points out that South Jones' responses to Section III of its application reveal the following proposed expenditures: $175 for legal costs; $100 for engineering costs; $500 for installation costs; $500 for shipping equipment and $500 for studio and office furniture. Southland asserts that these proposed expenditures are inadequate. Relying on the Smith affidavit (note 5, *supra*), Southland argues that South Jones has not made provision to prepare the sand-pit lot for an antenna, nor proposed expenditures for clearing and preparing parking areas, Further, Southland contends no expenditures were provided in the application for renovation, decoration, installation or plumbing or cesspool facilities, or for wiring to accommodate transmission facilities, control room equipment, cooling equipment, etc., for the proposed studio. Southland maintains that South Jones' Exhibit IV reveals that the applicant has already spent $176.62 on legal fees, which petitioner argues is $1.62 more than South Jones

[15] We agree with New South that Southland's arguments for strike and Suburban Community issues are inconsistent. On the one hand, Southland contends that it is to New South's advantage to have an FM station licensed in Ellisville rather than Laurel. On the other hand, Southland maintains that South Jones really proposes a substandard Laurel station. Petitioner cannot have it both ways. In any event, neither contention has been adequately supported by facts.

[16] The requested issue reads as follows:

To determine with respect to South Jones Broadcasters, Inc:

(a) Whether provision has been made for hearing and pre-operational expenses and, if so, the amounts provided and whether they are adequate for such purposes.

(b) Whether provision has been made for preparing the studio-transmitter site for use, for preparing a parking area, for renovation and sound proofing of the house designated for studio and transmitter use, for adequate facilities and amenities and for wiring of the building, and, if so, the amounts provided and whether they are adequate for such purposes.

(c) The total funds required to finance the proposed construction and operate the station for the first year, as reflected by the hearing record.

(d) Whether a bank loan of $30,000 will be available from the Merchants and Manufacturers Bank of Ellisville, Mississippi, the duration, terms and conditions for the loan, the security or guarantees required, and whether that security or guarantees will be furnished as required.

(e) Whether a bank loan of $5,000 will be available from the Merchants and Manufacturers Bank of Ellisville, Mississippi, the duration, terms and conditions for the loan, the security or guarantees required, and whether that security or guarantees will be furnished.

(f) Whether the bank loan determined to be available plus the existing capital are sufficient to meet the cost of construction and operation the first year, including hearing and pre-operational expenses and the costs referred to in subparagraph (b) above, as determined by the hearing record.

(g) Whether, in the light of the evidence adduced, South Jones Broadcasters, Inc. is financially qualified.

The availability of the $30,000 loan ((d) above) is already in issue, and has been included by Southland for completeness.

proposed to spend ($175.00). Obviously, continues petitioner more legal expenses will be incurred in the form of transcripts, exhibits and traveling expenses. Finally, petitioner submits that South Jones has not made any provision for the following pre-operational expenses: salaries for employees, cost of utilities, insurance, promotion and other items which occur prior to the station going on the air with program tests.

17. The Bureau would deny Southland's request for an issue inquiring into South Jones' legal expenses and pre-operational expenses. The Bureau argues that Southland's allegations lack the specificity and supporting documentation required by Rule 1.229(c). The Bureau also contends that, even taking into consideration Smith's affidavit, Southland failed to show that there is a need to level the land, prepare a parking lot, sound proof the building, construct adequate amenities, and/or wire the building to accommodate transmission facilities and control room equipment. The Bureau argues, however, that South Jones should present an itemized breakdown of the figures shown for "other items." In reply, Southland maintains that documentation is not required to show that further expenses (*e.g.* transcripts, duplication of exhibits, traveling expenses and other hearing expenses as well as such pre-operational expenses as salaries of employees, the cost of utilities, insurance, and promotional costs) are bound to arise. In this regard, Southland argues that the Board, in a similar situation, added a like issue in *Edward G. Atsinger III*, 30 FCC 2d 493, 22 RR 2d 236 (1971).

18. In opposition, South Jones asserts that, after its application was filed with the Commission, it was informed, by letter from the Broadcast Bureau, Broadcast Facilities Division, that is funds available were $1,131.00 short of meeting its proposed construction and first-year operating expenses. In order to cover this deficiency, South Jones explains that Holland and his wife obtained a $5,000 loan from the Merchants and Manufacturers Bank of Ellisville and that the loan is secured by the proposed site and proposed studio building, which building is now in existence. With the $3,611.74 balance [17] from the $5,000 loan, South Jones asserts, it will be able to meet any additional costs. South Jones contends that the existing facility has parking for fifteen cars on a well drained clay and sand mixture; therefore, arrangements for a larger parking facility will probably not be necessary. South Jones explains that Holland already has the necessary heavy duty wiring material which he intends to install himself and that the remodeling of the house into a studio will be done by Holland and Knotts, their wives and children; therefore, no new expenditures are foreseen with respect to remodeling. However, if new expenses should arise, South Jones believes that the $3,611.74 cushion will more than cover them, as well as any additional legal expenses which might arise in the future. South Jones next asserts that both the $30,000 loan (which is co-signed by eleven businessmen) and the $5,000 loan (which is secured by land and building) are available.

19. Contrary to petitioner's claims, we believe that South Jones'

[17] South Jones arrives at this balance by taking the difference between the $1,131.00 "short" figure and the $5,000 loan secured by the Hollands, which leaves a balance of $3,869.00, and subtracting from it $150.00 for remodeling expenses and $107.76 for traveling expenses.

pre-operational expenses and preparation costs are not unreasonable on their face, and that petitioner has failed to raise any serious questions that have not been satisfactorily explained by South Jones in its responsive pleading. See *Eastern Broadcasting Corp.*, 28 FCC 2d 28, 21 RR 2d 417 (1971); *Jay Sadow*, 27 FCC 2d 248, 20 RR 2d 1171 (1971). In our opinion, South Jones has adequately explained how it will meet its pre-operational costs; for example Holland has collected the necessary heavy duty wire for the studio and any necessary labor would be performed by Holland, Knotts, their wives and children. Furthermore, South Jones explains in its responsive pleading that no further expenses than indicated in its application will be incurred with respect to its antenna and studio location. The Board does not agree with Southland that the instant case is in accord with *Edward G. Atsinger III*, *supra*. Although *Atsinger* is similar in that, as here, questions were raised as to specific alleged inadeqaute cost estimates, the case is factually distinguishable. Unlike the applicant in *Atsinger*, South Jones has adequately explained, in its responsive pleading, how it intends to meet its pre-operational costs.[18] Although Southland submits the Smith affidavit to support its allegations, the affidavit is inadequate because it is based solely on Smith's unsubstantiated opinion and fails to show either a need to level the proposed antenna site and remove the trees around it or that expenditures for such alterations would be necessary. *Cf. Horn Industries, Inc.*, 28 FCC 2d 454, 21 RR 2d 851 (1971). Next, we note that a recent pleading submitted by South Jones to the Board,[19] reflects that South Jones is now represented by legal counsel. In our opinion, South Jones' allocation of only $175 for legal expenses would be inadequate to cover fees for experienced communications counsel, let alone other related legal costs; however, in the absence of specific allegations to the contrary, we believe that South Jones has shown that it has an adequate cushion to cover professional fees.[20] See *Home Services Broadcasting Corporation*, 21 FCC 2d 168, 18 RR 2d 63 (1970); *Virginia Broadcasters*, 22 FCC 2d 227, 18 RR 2d 763 (1970).

SUBURBAN COMMUNITY ISSUE

20. Southland supports its requests for a Suburban Community issue or, in the alternative, a comparative Suburban Community issue [21] by alleging that South Jones will, in reality, be serving Laurel

[18] We further note that the applicant in *Atsinger* demonstrated in its responsive pleading the availability of a bank loan and equipment credits; therefore, the Board did not include these two matters in the financial issue that was ultimately specified.

[19] "Petition for extension of time within which to file opposition to further petition to enlarge issues," filed June 8, 1972.

[20] Some confusion exists as to the amount of South Jones' cushion. South Jones claims a cushion of $3,611.74. However, an analysis of the applicant's financial showing reveals that $41,231 will be needed to construct and operate the proposed facility. South Jones claims that it has $45,438 in funds available to cover this cost, which leaves a cushion of $4,207. South Jones states in its opposition pleading that it will take from the cushion approximately $150 for remodeling and $107.26 for hearing expenses. This leaves a surplus of $3,949.74.

[21] Southland's requested issue (6) reads as follows:

"To determine whether the proposal of South Jones Broadcasters, Inc, would realistically provide a transmission service for Ellisville or for another larger community; or, if the above issue cannot be granted. To determine whether the proposal of South Jones Broadcasters, Inc., would realistically provide a local transmission facility for its specified station location and, in light thereof, whether the application should be considered as a proposal for Ellisville for the purpose of any determination which may be made under Section 307(b) of the Commission Act of 1943, as amended."

and not Ellisville. Laurel is a more desirable station location, Southland argues, because Laurel has a larger population (24,145 persons) than Ellisville (4,643 persons) and has retail sales of $56,575,000 compared to Ellisville's $3,031,000. Southland also notes that South Jones' antenna will be located north of Ellisville on the road to Laurel and will provide Laurel with a city-grade service. Southland therefore requests the addition of an issue to determine whether South Jones would realistically provide a transmission service for Ellisville or for another larger community. If the Suburban Community issue is not added, then, in the alternative, Southland requests the addition of a comparative Suburban Community issue, which would, in effect, deny South Jones the right to claim Ellisville as its station location for 307(b) purposes.

21. The Broadcast Bureau opposes the request. The Bureau does not believe that Southland has made a convincing showing which would warrant the addition of the requested issue. According to the Bureau, the Suburban Community policy is narrowly applied to a situation where the larger community has a population of less than 50,000 persons. The Bureau claims that Southland has not shown that Ellisville is a "suburb" of Laurel; that Ellisville is dependent on Laurel; or that South Jones has failed to ascertain and propose service for Ellisville's distinct unsatisfied needs. The Bureau concludes that Southland has shown no demographic, technical, or other relationship between Laurel and Ellisville, and, in support, cites *Durgin Associates, Inc.*, 10 FCC 2d 24, 11 RR 2d 205 (1967).

22. In reply, Southland argues that the significance of the *Durgin* case, cited by the Bureau, lies in the Commission's reliance on the "independent economic structure" of the community in question. According to Southland, it is "obvious" that Ellisville has no "independent economic structure" to support a broadcast station; therefore, South Jones will have to direct its advertising efforts to the more prosperous Laurel community.

23. In opposition, South Jones claims that only one of its stockholders resides in Laurel and that he owns a business in Ellisville; all the other stockholders "are residents of the Ellisville-Laurel . . . area . . . ." South Jones also argues that it intends to primarily serve Ellisville and secondarily to serve Jones County, where Laurel is located.

24. The Board is of the opinion that petitioner's allegations are wholly inadequate to warrant addition of either of the requested issues. Southland's request is premised on only three factual allegations: (1) the difference in population between Laurel and Ellisville; (2) Laurel's larger retail sales; and (3) the location of South Jones' proposed antenna site. These allegations are grossly inadequate to support the addition of either a potentially disqualifying or a comparative Suburban Community issue. In short, Southland has not met its heavy burden of presenting sufficient facts justifying an issue. See *Edward G. Atsinger, III, supra.*, 30 FCC 2d at 496, 21 RR 2d at 291. In *V. W. B. Inc.*, 8 FCC 2d 744, 10 RR 2d 563, reconsideration dismissed 10 FCC 2d 534, 11 RR 2d 653 (1967), the Commission stated that it is "not going to designate applications for hearing [on Suburban Community issues] merely because they happen to place a strong signal over a

somewhat larger community, because to do so would certainly disrupt [the Commission's] processes . . . ." 8 FCC 2d at 745, 10 RR 2d at 565. Significantly, Southland has not shown that Ellisville is dependent upon Laurel for its civic, social or business activities.[22] South Jones' application [23] shows that Ellisville has its own mayor and alderman, police and firemen, as well as several clubs and organizations such as a Chamber of Commerce, the Lions Club, the Federated Womens Club and American Legion. Furthermore, South Jones has made a community ascertainment survey of Ellisville's needs for local self-expression with respect to its problems and interests. In the designation Order, such survey was found by the Commission to comply with the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Finally, Southland has not shown, let alone alleged, that South Jones' program proposals are intended to serve the programming needs of Laurel rather than of Ellisville. See *News-Sun Broadcasting Co.*, 22 FCC 2d 488, 18 RR 2d 965 (1970). The Board therefore believes that a disqualifying Suburban Community issue is not warranted. For similar reasons, we do not believe that a comparative Suburban Community issue is warranted. Compare *Christian Voice of Central Ohio*, 29 FCC 2d 7, 21 RR 2d 762 (1971).

25. Accordingly, IT IS ORDERED, That the motion to accept comments, filed April 25, 1972, by Voice of the New South, Inc. IS GRANTED, and that the comments ARE ACCEPTED; and

26. IT IS FURTHER ORDERED, That the petition for waiver of Section 1.294 of the Commission's Rules to allow a late filing of a response to petition by Southland, Inc., to enlarge issues, filed March 23, 1972, by South Jones Broadcasters, Incorporated, IS GRANTED; that Section 1.294 of the Commission's Rules IS WAIVED in order to allow South Jones Broadcasters, Incorporated, to file a response to the petition to enlarge issues filed by Southland, Inc.; and that the aforementioned pleading IS ACCEPTED; and

27. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed March 1, 1972, by Southland, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[22] See *Resort Broadcasting Co., Inc.*, 26 FCC 2d 642, 20 RR 2d 768 (1970); *Outer Banks Radio Corp.*, 15 FCC 2d 994, 15 RR 2d 471 (1969).
[23] South Jones Application, Exhibits VIII, IX, X.

F.C.C. 72-768

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VIDEO EMPRESAS DEL OESTE, INC., AGUADILLA, P.R. For a Construction Permit	File No. BPCT-4450

MEMORANDUM OPINION AND ORDER

(Adopted August 29, 1972; Released September 6, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING

1. The Commission has before it (a) the application (BPCT-4450) of Video Empresas Del Oeste, Incorporated (Video Empresas), filed on June 24, 1971, for a new construction permit for a new television broadcast station to operate on channel 44, Aguadilla, Puerto Rico; (b) a petition to deny filed on August 3, 1971, by Quality Telecasting Corporation (Quality), licensee of television broadcast station WORA-TV, channel 5, Mayaguez, Puerto Rico; and (c) related pleadings.[1]

2. Since Video Empresas' proposed operation would place a competitive signal over the area now served by WORA-TV, Quality alleges that it will be subjected to economic injury and is, therefore, a party in interest. The Commission finds that petitioner has established its claim to standing. In support of its petition to deny, Quality argues that this economic competition will result in a diminution of its public service programming and, therefore, raises a *Carroll* question.[2] Quality also requests the Commission to look into the possibility of UHF impact with respect to channels 16 and 22 in Mayaguez. Quality further alleges that Video Empresas has substantially understated its proposed cost of construction and first-year operating expenses, and that even if Video Empresas' estimates are correct, it has not demonstrated the availability of funds to meet the estimates.

3. In support of its request for the inclusion of a *Carroll* issue, Quality alleges that economic conditions will force Video Empresas to affiliate with a San Juan station during its second year of operation. Quality argues that no television station has been able to operate on the west coast of Puerto Rico without an affiliation, and should Video Empresas affiliate, it would then result in substantial financial injury to station WORA-TV, and a concomitant loss of local service. In this connection, Quality also requests the Commission to inquire into Video

[1] On October 15, 1971, Video Empresas filed an opposition to the petition to deny and on December 1, 1971, Quality filed a reply to the opposition to the petition to deny.

[2] *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066 (1958).

Empresas' ability to sustain its proposed operation after the first year of operation. Video Empresas asserts that it has never stated any intention of affiliating with a San Juan station. The burden of supporting a *Carroll* issue is on the party making the request and the Commission finds that Quality's speculations of affiliation do not sustain that burden. In addition, Quality's apprehension of Video Empresas' alleged affiliation can not possibly provide the factual basis for departing from the Commission's policy regarding financial requirements as stated in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965). In support of its allegation of UHF impact, Quality argues that Video Empresas has failed to show that its proposed operation would not be harmful to UHF stations in the area. Quality, however, has failed to submit any factual evidence of possible impact on UHF development in the area, and absent this factual support, the Commission can not conclude that a grant of this application could affect UHF development. In any event, the Commission's UHF impact policy is primarily intended to protect UHF stations and allocations against the competitive impact of VHF stations and was never intended to impede the establishment of new UHF television stations. See *Triangle Publications, Inc.* v. *FCC*, 110 U.S. App. D.C. 214, 21 RR 2d 2039 (1969); *Sarkes Tarzian, Inc.*, 10 RR 2d 573; *WLVA, Inc.* v. *FCC*, 23 RR 2d 2081. Accordingly, a UHF impact issue will not be specified.

4. With respect to staffing costs, Quality has submitted an affidavit of Mr. Eleuterio Vega, Vice President of Quality Telecasting Corporation, stating that the implementation of Empresas' proposal would require a minimum staff of eleven full-time and two part-time personnel at a minimum cost of $78,775. In response, Video Empresas explains that Mr. Vega's estimate is based upon WORA–TV's operation in conjunction with stations WORA and WORA–FM, and that Video Empresas' proposed schedule of six hours per day does not require a large staff. On January 6, 1972, Video Empresas amended its staffing proposal to specify seven full-time and two part-time personnel at a cost of $49,300. Video Empresas' revised staffing proposal appears to be adequate to program forty-two hours per week and proposed costs appear to be in line with current wage scales of Puerto Rico. Quality's allegation of inadequate salaries is not sufficient to warrant the inclusion of a staffing issue.

5. In support of the allegation that Video Empresas has understated its equipment costs, Quality has submitted an affidavit of Mr. Robert E. L. Kennedy, a professional consulting engineer who has served as consultant to WORA–TV. Mr. Kennedy's affidavit states that the actual cost of the purchase and installation of the proposed antenna system should be $72,900 rather than Video Empresas' projection of $8,760 and that the cost of program origination capability should be $85,400 as opposed to Video Empresas' estimate of $45,000. Quality, citing *Sunset Broadcasting Corp.*, 5 FCC 2d 321 (1966), contends that the Commission should specify an issue inquiring into Video Empresas' proposed equipment costs.

6. On October 15, 1971, Video Empresas amended its application and increased its projected cost of program origination equipment to $73,377 and increased its projected cost of its antenna system to

109-008—72——10

$15,699.59. In response to a Commission letter of June 20, 1972, requesting information regarding the disparity of antenna system equipment estimates, Video Empresas on July 3, 1972, amended its application to include a new equipment letter from San Juan Electronics stating that the cost of a 200-foot Rohn guyed tower, an Ampex BR–20 antenna, and an Ampex No. 318–01111 transmission line will be $18,100, and that the terms of repayment would remain unchanged. Unlike *Sunset Broadcasting Corporation*, where the applicant submitted a vague, confusing and inconsistent plan for purchase of equipment, Video Empresas has submitted a thorough program proposal. Since Video Empresas has submitted sufficient data with respect to its projected equipment costs and since it appears that these projected costs are not unusually low for a new UHF television broadcast station, the Commission will not specify an issue.

7. With respect to projected programming costs, Quality submits that Video Empresas' estimate of $80,000 is inadequate to program 1,612 hours of "recorded" programming and 572 hours of "local" programming. Quality argues that, assuming Video Empresas is able to purchase film at $150 per half hour,[3] the projected programming costs for film should be $241,800 plus an additional amount allocated for "local" programming. In support of its programming proposal, Video Empresas, on January 6, 1972, submitted a letter from the Independent Television Corporation stating that the film could be purchased for $100 to $150 per half hour with unlimited reruns. In response to a Commission letter of April 18, 1972, requesting further information supporting its programming proposal, Video Empresas submitted an amended programming proposal of $96,950 which included unlimited reruns of 50 films at $700 each, 60 films at $250 each, and 313 video tapes at $150 each. In view of the applicant's limited proposal of 42 hours per week and capacity to show unlimited reruns, the Commission is unable to make a finding that the applicant has underestimated its programming costs, and, therefore, an issue will not be specified.

8. Quality alleges that even if Video Empresas has correctly estimated its costs of construction and operating the station during the first year, it has not demonstrated the availability of funds to meet these costs. Quality claims that the applicant's proposed bank loan is not a commitment since it uses conditional language, the terms for repayment are not stated, and a commitment fee for $2,000 has not been paid. On October 15, 1971, Video Empresas submitted a letter dated September 10, 1971, from the Banco Popular of Puerto Rico, certifying the receipt of a $2,000 commitment fee. On January 6, 1972, Video Empresas submitted a letter dated December 15, 1972, from the Banco Popular which amended the conditional language of the previous bank letter, and included complete terms for repayment. On April 5, 1972, Video Empresas submitted an additional $50,000 commitment from Banco Popular, and on May 18, 1972, the applicant submitted advertising commitments of an additional $115,000. Without relying upon these anticipated revenues Video Empresas has demonstrated the avail-

[3] The figure of $150 per half hour is based upon a letter of August 2, 1971, from Promotores Asociados notifying Video Empresas that film would be available for $150 per half hour.

ability of $347,400 [4] to meet a requirement of $322,443.44.[5] The Commission, therefore, finds the applicant financially qualified and will not specify a financial issue.

Finally, we find that the applicant is legally, technically, financially and otherwise qualified to construct, own and operate the station in the manner proposed and that grant of the application would serve the public interest, convenience and necessity.

9. Accordingly, there being no substantial or material question of fact to be resolved, IT IS ORDERED, That the application of Video Empresas Del Oeste, Incorporated, for a construction permit for a new television broadcast station to operate on channel 44, Aguadilla, Puerto Rico, IS GRANTED and that the petition filed by Quality Telecasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] This figure can be broken down as follows: existing capital, $44,623; pre-paid expenses, $8,577; new capital, $44,200; and a bank loan, $250,000.

[5] This figure can be broken down as follows: down payment on equipment, $50,523.15; twelve months' payment on equipment (including interest), $37,536.29; payment on bank loan (including interest), $49,084; building, $17,000; salaries, $49,300; operating expenses, $8,300; programming, $96,950; commission grant fee, $4,500; and miscellaneous, $9,250.

F.C.C. 72R-231

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WIOO, INC., CARLISLE, PA.	Docket No. 19468 File No. BPH-6572
HOWARD J. HILTON, JOHN E. McGOWAN, AND JOHN E. HILTON, D.B.A. HILTON, McGOWAN & HILTON, CARLISLE, PA.	Docket No. 19469 File No. BPH-6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT, D.B.A. CUMBERLAND BROADCASTING CO., CARLISLE, PA. For Construction Permits	Docket No. 19471 File No. BPH-7404

MEMORANDUM OPINION AND ORDER

(Adopted August 18, 1972; Released August 22, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. The above-captioned mutually exclusive applications for a new FM broadcast station on 93.5 mHz (Channel No. 228) at Carlisle, Pennsylvania, were designated for hearing in a consolidated proceeding by Commission Order, FCC 72-233, released March 24, 1972, 37 FR 6519. Alexander Contract and Sylvia Contract, d/b as Cumberland Broadcasting Company (Cumberland), have petitioned the Board to enlarge the issues as follows:

(a) To determine whether WIOO, Inc., and or any of its principals, has at any time made misrepresentations to the Commission, been lacking in candor, or failed to disclose material information.

(b) To determine whether WIOO, Inc., and or any of its principals attempted to secure or secured false evidence of a loan commitment in order to establish its financial qualifications thereby abusing or attempting to abuse the Commission's processes.

(c) To determine whether WIOO, Inc., and or any of its principals has the requisite character qualifications to be a licensee of the proposed frequency modulation broadcast station.

(d) To determine whether WIOO, Inc., has complied with the provisions of Section 1.65 of the Commission's Rules.

(e) To determine the financial qualifications of WIOO, Inc., and or its principals to construct and operate for the first year the proposed frequency modulation broadcast station.

(f) To determine in light of the evidence adduced pursuant to the foregoing issues, the effect on the requisite and/or comparative qualifications of WIOO, Inc., and or any of its principals.[1]

2. Cumberland bases its request on the following circumstances. The Commission found that WIOO, Inc. would require $57,150.00 to construct its proposed FM station and to operate it for one year. At the time its application was designated for hearing, WIOO relied upon

[1] The Board also has before it for consideration: a supplement to Cumberland Broadcasting Company's petition to enlarge issues, filed April 17, 1972; an opposition to petition to enlarge issues, filed by WIOO, Inc., May 15, 1972; Broadcast Bureau's comments on Cumberland Broadcast Company's petition to enlarge, filed May 15, 1972; supplement to comments on Cumberland petition to enlarge, filed by Broadcast Bureau, May 24, 1972; and Cumberland Broadcast Company's reply to the oppositions, filed May 25, 1972.

a $20,000 proposed loan from Harold Swidler, a $10,000 proposed loan from Norman Swidler,[2] a loan commitment in the amount of $35,000 from the First National Bank of Shippensburg, Shippensburg, Pennsylvania, and a loan commitment in the amount of $60,000 from the National Central Bank of Harrisburg, Harrisburg, Pennsylvania.[3] Cumberland alleges that as of April 12, 1972, WIOO had no loan commitment from First National Bank of Shippensburg and in fact never had such a commitment; nor did it have a loan commitment from the National Central Bank of Harrisburg, Harrisburg, Pennsylvania in the amount of $60,000 as of April 12, 1972. Moreover, Cumberland contends that, in view of a large number of recorded mortgages and outstanding judgments entered against the Swidler brothers jointly and individually and their various business enterprises, the balance sheets of Harold and Norman Swidler do not accurately reflect their financial condition and do not support their ability to make the loans to which they have committed themselves. These several allegations are supported by four affidavits of Mr. Alexander Contract, a 50% partner in Cumberland and three affidavits of Mrs. Sylvia D. Contract, also a 50% partner, as well as copies of lists of recorded mortgages and judgments supported by the affidavits of Mr. Henry B. Breen, recorder of deeds, Cumberland County and Mr. Glen R. Farner, prothonotary of Cumberland County, Pennsylvania.

3. The Contract affidavits essentially allege that Mr. and Mrs. Contract spoke to officials of the First National Bank of Shippensburg, Shippensburg, Pennsylvania, particularly Mr. Joseph D. Hazzard who had signed the loan commitment to WIOO, Inc. and Mr. Gurdon G. Potter, President of the First National Bank of Shippensburg, Shippensburg, Pennsylvania, on April 12 and 14, 1972; that they were advised that the bank had rescinded its commitment to WIOO, Inc., and that Mr. Norman Swidler was advised by letter dated April 14, 1972 that the bank no longer considered the personal guaranty of Norman and Harold Swidler to be acceptable security. The Contracts also state that during the course of these conversations Mr. Hazzard advised them that at the time the Swidlers requested the $35,000 loan commitment, Norman Swidler told the bank officials that WIOO, Inc. really did not need the money, but wanted to show the Federal Communications Commission that the money would be available—like window dressing. The Contracts attach a very short letter addressed To Whom It May Concern, over the signature of Joseph Hazzard which states: "We regret to inform you that we find it necessary to cancel our previous commitment to Mr. Swidler due to Mr. Swidler's present position", and a letter over the signature of Mr. Gurdon Potter addressed to Cumberland Broadcasting which states that the December 22, 1971 loan commitment to WIOO, Inc. is no longer in effect and that Mr. Norman and Harold Swidler, who were to guaranty the note, had experienced severe financial reverses and their guaranty is not considered acceptable security by the bank. The list of outstanding mortgages submitted with Cumberland's petition shows mortgages recorded on five parcels of real estate, titled either to Harold and Norman Swidler or Swid Brothers Discount Center for a total amount of $73,500, and the list of judgments running

[2] The Swidlers are brothers and each owns 50% of the stock of WIOO.
[3] At the time WIOO submitted the above described financial proposal it stated that it did not need the $60,000 loan commitment but it was submitted to provide assurance of its financial qualifications.

against Swid Brothers, Inc. or Norman Swidler or Harold Swidler on the N–H Corporation beginning with the May term of 1968, shows 29 judgments with a face value of $161,818.96.

4. Cumberland contends that since WIOO, Inc. did not at any time have available to it the $35,000 loan commitment from the First National Bank of Shippensburg, it has misrepresented to the Commission its financial qualifications and has in fact attempted to secure false evidence of a loan commitment and thus abuse the Commission's processes. Cumberland also contends that when WIOO told the Commission that its loan commitment from National Central Bank of Harrisburg was not necessary to establish its financial qualifications, it was misrepresenting the facts. Cumberland argues that therefore its requested issues (a), (b) and (c) should be included in these proceedings. Cumberland also contends that since the loan commitment from the National Central Bank of Harrisburg was terminated by the Bank as of December 17, 1971, and WIOO failed to inform the Commission of the unavailability of this loan, it has violated the requirements of Section 1.65 of the Commission's Rules and therefore its proposed issue (d) should be included. Moreover, Cumberland contends that the balance sheets submitted by Norman and Harold Swidler failed to show numerous outstanding judgments and mortgages and thus it is impossible to find WIOO, Inc. financially qualified. In view of these circumstances, Cumberland requests its proposed issue (e) and its conclusory issue (f) in view of all of the foregoing.

5. WIOO, Inc. opposes the addition of these issues. It contends that it did in fact have a loan commitment from the First National Bank of Shippensburg in the amount of $35,000, as evidenced by the letter of Joseph Hazzard, Cashier of the First National Bank dated September 17, 1971, and submitted with its application. Moreover, WIOO contends that it was not aware of the bank's recision of its arrangement with WIOO and Norman and Harold Swidler until it received the letter dated April 12 from Hazzard, and that prior to that time the Swidlers had continued to rely upon the letter originally written by the bank. Moreover, WIOO contends that its loan commitment from the National Central Bank of Harrisburg, Harrisburg, Pennsylvania, had been arranged to provide a ninety-day commitment letter dated September 17, 1971, which was to be renewable up to three times for a possible total of one year. The Swidlers allege that they were not aware that the September 17 letter had not been extended until Cumberland filed its petition to enlarge. To support its contentions, WIOO attaches a letter from Albert W. Case, Vice President of North Central Bank of Harrisburg, which states there was a meeting between the Swidlers and officers of the Bank and it was agreed that since there was a misunderstanding as to the collateral to be required, the commitment would not be extended; and that this action under no circumstances is to be construed as a reflection on the honesty or integrity of either Henry Swidler, who has long dealt with the bank, or Harold Swidler, who is held in high regard by the bank. WIOO concedes that there was a meeting between Mr. Case, Vice President of the Bank, and Mr. Harold Swidler and his father, Henry Swidler, and that there was some discussion concerning the required collateral; however, neither Harold Swidler nor his father, Henry Swidler, understood that the commitment would not be renewed on December 17, 1971, and

again three months later as proposed in the initial letter agreement. In view of these circumstances, WIOO contends there is no justification for Cumberland's proposed issues (a), (b), (c) and (d). Furthermore, WIOO notes that it is submitting an amendment which provides for a new plan of financing.[4]

6. According to the amendment WIOO is no longer relying on loan commitments, either from the Shippensburg bank or the Harrisburg bank, but now relies upon a commitment of Harold and Norman Swidler to lend WIOO, Inc. whatever funds are necessary for the construction and operation of the proposed FM station. This commitment is supported by their respective balance sheets, dated April 21, 1972 and submitted as part of its amendment, and a loan commitment, dated April 21, 1972 from the Farmers Trust Company of Carlisle, Pennsylvania to lend Harold Swidler $50,000 to be devoted to the construction and operation of the proposed FM station. This letter of commitment requires a first lien mortgage on a warehouse building located at 876 Harrisburg Pike, Carlisle, Pennsylvania. That property is shown to be unencumbered. In addition to these commitments there is a letter of commitment, dated April 21, 1972, signed by Henry Swidler in which he agrees to lend WIOO, Inc. $30,000 to be used for the construction and operation of a proposed FM broadcast station in Carlisle, Pennsylvania with the notation that no collateral will be required for this loan. Henry Swidler's ability to make the loan is evidenced by his balance sheet dated April 21, 1972 and a loan commitment of $10,000 from the Harrisburg National Bank and Trust Company, Harrisburg, Pennsylvania. WIOO argues that in view of this financial plan, there is no need for the financial qualifications issue and that since it was not aware of the bank's actions withdrawing their prior loan commitments, it had no obligation to advise the Commission of the changed circumstances. Accordingly, WIOO contends, Cumberland's petition should be denied.

7. The Broadcast Bureau takes the position that WIOO's failure to advise the Commission of outstanding mortgages and recorded judgments against its principals and their various businesses raises the possibility of misrepresentation concerning this aspect of WIOO's application. The Bureau also points out that at no place in its application did WIOO show the ownership of the N–H Corporation, which was wholly owned by Norman and Harold Swidler, and which is shown by the affidavits in this proceeding to have been involved in a Chapter IX of the Bankruptcy Act arrangement proceeding at the time the application was filed. The Bureau contends that these circumstances warrant inclusion of the proposed misrepresentation issue. The Bureau agrees with WIOO that the proposed abuse of process issue is not warranted since WIOO did in fact have a $35,000 loan commitment from the Shippensburg bank and the Swidlers were not advised that the bank had withdrawn its commitment until April 14, 1972. The Bureau contends that WIOO's failure to report a December, 1971 judgment of $5,000 and a September, 1971 judgment of $60,000 against the Swidler Brothers within 30 days of their entry warrants the inclusion of a Section 1.65 issue. The Bureau also supports the inclusion of a financial qualifications issue on the grounds that it is impossible to

[4] WIOO's petition to amend was granted by the Examiner by Order, FCC 72M–712, released May 31, 1972.

ascertain the exact financial status of WIOO and its principals, the Swidler Brothers.

8. The Review Board will add an issue to determine whether WIOO, Inc. or any of its principals has, at any time, been lacking in candor, failed to disclose material information or made misrepresentation to the Commission. At the time this matter was designated for hearing, WIOO purported to rely on a $20,000 loan from Harold Swidler and a $10,000 loan from Norman Swidler. The balance sheets of those principals submitted to support their ability to make the proposed loans showed substantial assets; however there was no indication of outstanding mortgages on property owned by them and their respective businesses or judgments recorded against them.[5] Moreover, there was no reference to the N–H Corporation which is wholly owned by Norman and Harold Swidler and was at that time involved in a bankruptcy proceeding.[6] WIOO's failure to provide all the pertinent information concerning the financial position of the principals upon whom it relied for financial support and their wholly owned businesses raises sufficient questions to warrant the inclusion of an issue in this proceeding to determine whether WIOO has misrepresented material facts to the Commission or has been lacking in candor.

9. The Board finds no basis for Cumberland's proposed abuse of process issue. The request hinges entirely on Cumberland's allegation that WIOO did not, in fact, have a loan commitment from the First National Bank of Shippensburg. The correspondence from the bank belies this contention and even Cumberland concedes that the bank did in fact agree to lend WIOO $35,000. That requested issue will therefore be denied.

10. Nor is the Board persuaded that a financial qualifications issue is warranted in this proceeding in view of WIOO's amended financial proposal. In its most recent financial showing, WIOO relies upon a $50,000 proposed loan from the Farmers Trust Company of Carlisle, Pennsylvania, which is supported by a letter committing the bank to make such a loan to Mr. Harold Swidler and a letter from Swidler to the effect that the proceeds of such loan will be used for the purpose of construction and operating WIOO's proposed FM station, and a loan from Mr. Henry Swidler, father of the Swidlers, in the amount of $30,000. Mr. Henry Swidler's commitment to lend WIOO $30,000 is evidenced by a letter over his signature dated April 21, 1972. He has supported his ability to make the loan by his balance sheet dated April 21, 1972, which shows a net worth of $203,000 with cash on hand, $7,000, savings bonds, $4,500 and marketable securities listed on the New York Stock Exchange and the American Exchange (these securities are not identified) valued at $9,000, and a letter of commitment from the Pennsylvania National Bank and Trust Company at Harrisburg, Pennsylvania to lend Mr. Henry Swidler up to $10,000. Thus, even if we disregard Mr. Henry Swidler's marketable securities because they are not identified, he would have liquid assets of $21,500 to lend

[5] The Board has taken into account WIOO's statement that "voluntarily confessed judgments" are used as a security device in Pennsylvania and do not necessarily represent an adjudicated obligation or overdue account. In any event they represent an obligation of the person against whom the judgment runs and as such have a real bearing on the financial position of Norman and Harold Swidler.

[6] Norman and Harold Swidler were obliged to advise the Commission of their interest in N–H Corporation and having done so could have explained its financial situation and its relationship to the Swidler brothers as individuals.

WIOO. This, together with the proposed $50,000 loan from the Farmers Trust Company of Carlisle, Pennsylvania totals $71,500, well in excess of the $57,150 the Commission found to be necessary to construct and operate the proposed FM station for one year without reliance on income. A financial qualifications issue will therefore not be added to the proceeding.

11. WIOO's failure to report the $60,000 judgment entered against Norman and Harold Swidler in December of 1971 [7] and the $5,000 judgment entered against Norman and Harold Swidler in February of 1972 [8] raises questions under Section 1.65 of the Commission's Rules. For while there was no financial issue pending against WIOO, Inc., its proposed financing had in fact, been questioned by a Commission letter and since it was relying upon the ability of Harold Swidler to lend it $20,000 and Norman Swidler to lend it $10,000, any substantial changes in the financial situation of those principals were of substance and failure to report such changes raises questions concerning WIOO's compliance with Section 1.65 of the Commission's Rules. Since WIOO failed to report these judgments, which, despite its explanations, appear to have a substantial bearing on its financial qualifications, a Section 1.65 issue will be included in the proceeding.

12. Accordingly, IT IS ORDERED That the petition of Cumberland Broadcasting Company to enlarge issues, filed April 14, 1972 IS GRANTED to the extent indicated herein and DENIED in all other respects and the issues in this proceeding are enlarged as follows:

a. To determine whether WIOO, Inc. and/or any of its principals have been lacking in candor, or failed to disclose material information or made misrepresentation to the Commission.

b. To determine the facts surrounding certain judgments entered against Norman and Harold Swidler and whether WIOO's failure to report those judgments constitute violations of Section 1.65 of the Commission's Rules.

c. To determine in light of the evidence adduced pursuant to the foregoing issues the effect on the requisite and comparative qualifications of WIOO, Inc. to be a licensee of this Commission.

13. IT IS FURTHER ORDERED, That the burden of proceeding under issue a and b above, SHALL BE on Cumberland Broadcasting Company, and the burden of proof under all of the issues added herein SHALL BE on WIOO, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[7] According to Gross, local counsel for the Swidlers, the $60,000 judgment entered against each of the Swidler brothers "actually represents one indebtedness and that totals approximately only $25,000, being the indebtedness on the mortgage given for property owned by the Swidlers in the Borough of Shippensburg. The mortgagee chose to exercise its option to enter judgment on the mortgage bond in the penal sum of twice the original indebtedness, or $60,000. Although the mortgage is technically in default under its original terms the Swidlers and the mortgagee have reached an understanding. Principal payments can be deferred until the Shippensburg building is rented.

[8] It is not possible to determine from the pleadings before us whether the obligations in favor of Gross in the amount of $5,000 against each of the Swidler Brothers represent a single $5,000 obligation secured by both brothers or a $5,000 obligation of each brother for a joint total of $10,000. In any event, Gross stated that the judgments were security for an obligation which was not in default.

F.C.C. 72R-237

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WPIX, INC. (WPIX), NEW YORK, N.Y. For Renewal of Broadcast License FORUM COMMUNICATIONS, INC., NEW YORK, N.Y. For Construction Permit for New Television Broadcast Station	Docket No. 18711 File No. BRCT-98 Docket No. 18712 File No. BPCT-4249

MEMORANDUM OPINION AND ORDER

(Adopted August 23, 1972; Released August 25, 1972)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of WPIX, Inc. (WPIX), requesting renewal of its television station license for Channel 11 at New York, New York, and Forum Communications, Inc. (Forum), requesting a construction permit for a similar facility at New York. The applications were originally designated for hearing on various issues by Commission Order, released October 28, 1969. 20 FCC 2d 298, 17 RR 2d 782. Subsequently, by Order, FCC 72-144, 37 FR 4306, published March 1, 1972, the Commission redesignated all issues in this proceeding in response to an order of the United States Court of Appeals for the District of Columbia Circuit directing the Commission to comply with the mandate of that Court in *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 1201, 22 RR 2d 2001 (1971).[1] Presently before the Review Board for consideration is a motion to enlarge issues, filed March 16, 1972, by WPIX, which seeks the addition of an issue to determine the availability of Forum's proposed antenna site and, if available, the effect thereof upon Forum's financial qualifications.[2]

2. To facilitate an understanding of the matters raised in the instant pleadings, some brief background information concerning Forum's proposed transmitter location is appropriate. In its application, which was filed on May 11, 1969, Forum proposes to locate its transmitter and antenna system atop the north building of the proposed World Trade Center in New York City. The World Trade Center, whose construction was a matter of substantial controversy because of the interference expected to be caused to television broadcast reception

[1] On May 10, 1972, the Commission granted limited reconsideration of the Redesignation Order, 34 FCC 2d 930, 24 RR 2d 323.

[2] Also before the Board are the following related pleadings: (a) opposition, filed May 5, 1972, by Forum; (b) opposition, filed May 5, 1972, by the Broadcast Bureau; and (c) reply, filed May 17, 1972, by WPIX. The instant motion is timely filed. See *WPIX, Inc. (WPIX)*, 34 FCC 2d 419, 24 RR 2d 59 (1972), review denied FCC 72-616, released July 19, 1972.

service in the New York metropolitan area, is to be constructed and operated by the Port of New York Authority (Port Authority), a joint and common governmental agency of the states of New York and New Jersey. To alleviate the predicted interference problems, the Port Authority and the nine television station licensees to be affected by the erection of the World Trade Center entered into an agreement in June of 1967, looking toward the relocation of their transmitters and antenna systems from their present location atop the Empire State Building in New York City and their use of a multiple antenna structure at the World Trade Center.[3] The agreement also provides, *inter alia*, that: (a) the Port Authority will construct broadcast facilities at the World Trade Center by purchasing, installing and testing, at its cost and expense, the masts, the antenna systems and ancillary broadcast equipment necessary to render broadcasting capability equal to that afforded the licensees at the Empire State Building; (b) each licensee will purchase its transmitter and ancillary transmitting equipment with the Port Authority bearing the cost of installation and partially reimbursing the licensee for the purchase price of such equipment deemed to be "substitute and equal" to that in use at the Empire State Building; and (c) the Port Authority will lease its World Trade Center facilities to the licensees "at the same rentals and other payments and upon substantially the same terms and conditions" as the licensees' existing agreements for such occupancy and use at the Empire State Building. By its terms, the agreement, which "is intended to and shall constitute a binding contract between the parties hereto", is subject to obtaining all of the necessary authorizations from the governmental authorities and to the "determination by the [signatory licensees] that relocation to the Tower is suitable for Broadcasting and is the best solution to the interference problems caused by the Center".

3. Initially, Forum's application reflected an allocation of $400,000 for a new transmitter and related transmitting equipment and a projection of $98,000 for first-year antenna rental at the World Trade Center. WPIX challenged the reasonableness of the latter estimate, which had been premised upon Forum's belief that since it would be replacing WPIX as the lessee of the Channel 11 antenna at the World Trade Center, its lease would embody the terms and conditions set forth in the aforementioned June, 1967 agreement. On the basis of a formula which the Port Authority has developed for determining antenna rental at the World Trade Center for stations whose antennas are not located at the Empire State Building, WPIX contended that Forum would incur antenna rental expenses of at least $146,000 during its first year of operation. On December 23, 1969, Forum amended its application to increase its allowance for first-year antenna rental to $146,000, albeit it still maintained that it could obtain the more favorable lease terms extended to WPIX and the other Empire State Building lessees.

[3] Applications seeking Commission authorization to relocate to the World Trade Center have been filed by the licensees of New York City television broadcast Stations WCBS (Channel 2), WNBC (Channel 4), WNEW (Channel 5), WABC (Channel 7), and WOR (Channel 9). See BPCT-4280, *et al.* WIPX has not yet sought to relocate its Channel 11 facilities from the Empire State Building; however, WPIX is a signatory to the June, 1967 agreement. Other signatories to the agreement include the Educational Broadcasting Corporation (Channel 13), the City of New York Municipal Broadcasting System (Channel 31), and New Jersey Television Broadcasting Corp. (Channel 47).

4. WPIX essentially premises its request for a site availability issue on two grounds: first, that the use of the World Trade Center as a site for television broadcast transmission has been objected to by the licensees of two Philadelphia UHF television stations; and second, that the Port Authority has requested the Commission to hold a hearing concerning the proposals involving the World Trade Center. In its submissions to the Commission, the Port Authority contends that the Interference problems stemming from the erection of the World Trade Center do not appear to be as severe as earlier anticipated; that any resultant interference problems can be minimized by modification of the existing broadcast facilities at the Empire State Building; and that relocation of television facilities to the World Trade Center will cause new interference problems and massive antenna reorientation by the public. With regard to the financial aspect of its request, movant contends that Forum's revised proposal for transmitter and antenna system rental, which is more than two years old, does not reflect the current situation and is unsupported by any agreements or understanding with the Port Authority.[4] In support thereof, WPIX submits an affidavit, dated March 9, 1972, from T. E. Mitchell, its vice-president and treasurer, who assumes that various unforeseen expenses incurred by the World Trade Center will be passed on to any new party, like Forum, seeking to obtain an antenna rental agreement. Movant also submits an unverified letter, dated November 5, 1971, from the Port Authority's director of the World Trade Department, who states that the Port Authority has "no agreement, written or oral, nor have we had any discussions with Forum . . . in regard to their broadcasting from the World Trade Center". WPIX further notes that Forum has not come forward with an alternative transmitter and antenna proposal in the event the move to the World Trade Center is denied by the Commission or delayed beyond the time when the applicant would otherwise be ready to commence broadcast operations.

5. Both Forum and the Broadcast Bureau object to the addition of the requested issue. Initially, Forum opposes the WPIX motion on procedural grounds, pointing to the lack of an affidavit from the Port Authority stating that Forum's proposed transmitter site will be unavailable. While it does not now have absolute assurance of the availability of its proposed transmitter site, Forum maintains that it is reasonably assured—should the Commission grant the pending relocation applications—that it will be able to lease space on the antenna complex at the World Trade Center. Since the master antenna atop that building "includes, as an integral part, an antenna specifically designed for Channel 11", the Port Authority as a quasi-public body can be expected, argues Forum, to make that antenna available to the licensee of Channel 11 on fair and equitable terms.[5] Alternatively, Forum submits that should the other New York City

[4] WPIX notes that the Port Authority has recently refused to offer the licensee of television broadcast Station WXTV, Paterson, New Jersey, the same lease terms and conditions that it extended to the Empire State Building lessees.

[5] Similarly, the Bureau, which regards the instant situation as analogous to those where the proposed sites are zoned in a manner prohibiting the erection of broadcast facilities, submits that the present controversy concerning the propriety of locating the television facilities at the World Trade Center does not create a substantial probability that Forum will be unable to obtain its proposed transmitter site.

television stations decide not to move to the World Trade Center or should the Commission deny the proposed relocation, it is prepared to amend its application to specify the antenna farm atop the Empire State Building as an alternative site. With regard to the costs of Forum's antenna site proposal, both the applicant and the Bureau contend that WPIX's assertions of increased rental costs are insufficient to provide the basis for further examination of Forum's financial qualifications.

6. In reply, WPIX renews its request, arguing that the Port Authority opposes the location of *any* broadcast facilities at the World Trade Center and that a substantial doubt exists as to that site's availability, not only for the existing New York City licensees which are parties to the June 1967 agreement, but even more so for applicants, like Forum, which have no such agreement and which have not approached the Port Authority to ascertain the terms upon which they could use the World Trade Center. In movant's view, Forum's suggestion that it may locate its broadcast facilities at the Empire State Building, rather than at its specified site, is incompatible with the statutory requirement that an applicant's qualifications be established prior to a grant of its application.

7. The Review Board will deny the requested site availability and related financial issue. WPIX does not allege that Forum proposed a transmitter site without reasonable assurance that it will be available for the intended purpose. Rather, the movant argues that Forum no longer has the required reasonable assurance because of the "changing attitude" of the Port Authority, the lessor of the proposed site. This argument, however, is not persuasive in view of the "binding contract" between the Port Authority and the New York City television licensees, obligating the Port Authority to construct broadcast facilities for the use of these licensees at the World Trade Center. See paragraph 2, *supra*. There is no indication that the June, 1967, agreement has been rescinded or that the Port Authority will not honor its contractual obligations. Forum is not a party to the June, 1967 agreements; however, it does not appear that the Port Authority is unwilling to extend the use of its premises to Forum. In this regard, the Board notes that the lessor has established a formula to determine antenna rentals at the World Trade Center for those stations whose antennas are not presently located at the Empire State Building. More important, the Port Authority has designed an interrelated antenna complex with special provision for a Channel 11 operation. Under these circumstances, the Review Board does not find it unreasonable for Forum to assume that it can utilize the broadcast facilities at the World Trade Center in the event WPIX's renewal application is denied. See *United Television Co., Inc.* (*WFAN–TV*), 18 FCC 2d 363, 16 RR 2d 621 (1969). The possibility that the pending relocation applications may be denied or that a hearing concerning the proposed use of the World Trade Center may be required does not undermine Forum's continued reliance upon the availability of its specified site.[6] *Cf. John*

[6] It is well established that neither a binding agreement nor absolute assurance of site availability is required by the Commission. *E.g., Edward G. Atsinger, III*, 30 FCC 2d 493, 22 RR 2d 236 (1971).

Hutton Corp., 27 FCC 2d 214, 20 RR 2d 1159 (1971); *WSTE-TV, Inc.* (*WSTE*), 12 FCC 2d 986, 13 RR 2d 95 (1968); *Fine Music, Inc.* (*WFMI*), 7 FCC 2d 187, 9 RR 2d 917 (1967), reversed in part on other grounds 8 FCC 2d 529, 10 RR 2d 400 (1967): *Beacon Broadcasting System, Inc.*, FCC 61–684, 21 RR 727, released May 26, 1961. In addition, as the Board stated in *RKO General, Inc.* (*WNAC–TV*), 24 FCC 2d 240, 19 RR 2d 553 (1970), "the fact that [Commission] approval is required does not of itself preclude a finding of 'reasonable assurance' ". In view of the foregoing, the Review Board concludes that WPIX's allegations do not warrant the addition of the requested site availability issue. Similarly, WPIX's allegations concerning the related financial issue lack the specificity and supporting documentation required by Rule 1.229(c). In response to WPIX's earlier contentions, Forum has increased its estimate for first-year antenna rental at the World Trade Center (see paragraph 3, *supra*), and the present $146,000 allocation does not appear unrealistic. The assumption by one of movant's corporate officers that the World Trade Center's increased costs will be "passed on" to Forum is clearly insufficient to warrant a further financial inquiry at this time. WPIX's request will, therefore, be denied.

8. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed March 16, 1972, by WPIX, Inc. (WPIX), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.